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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

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Federal Communications Commission Record

Volume 7
Issue 11

Table of Contents

Table of Cases..... i

Table of FCC and Delegated Authority Numbers..... iii

Table of Docket Numbers..... iv

Table of Rulemaking Numbers..... v

Table of Localities..... vi

Table by Subject Matter..... vii

Table by Statutory and Rule Provisions..... xi

Decisions, Reports, Memorandum Opinions, Orders, and Other Selected Material..... 3098

Federal Communications Commission Record

Table of Cases
Volume 7
Issue 11

Case Name	Page
ALLTEL Service Corporation	3313
AT&T Communications	3315
AT&T Communications	3316
AT&T Communications	3318
AT&T Communications	3319
AT&T Communications	3320
AT&T Communications	3323
Advanced Television Systems	3340
Amendment of Section 0.561 - Systems of Records	3123
Amendment of Parts 1, 2, and 21 - Processing of MDS Applications	3266
Amendment of Parts 2 and 15 - Electromagnetic Emissions	3128
Amherst Telephone Company	3210
Center for Study and Application of Black Economic Development	3101
Channel 33, Inc.	3224
Children's Television Programming	3197
Christian Family Cinema, Inc.	3304
Clifford Electronics, Inc.	3162
Communications Satellite Corporation	3119
Country Investments Limited Partnership	3190
Deas Communications, Inc.	3135
Delegation of Authority in Forfeiture Proceedings	3121
FaxCheck Systems	3331
GAF Corporation	3225
GE American Communications, Inc.	3212
Godwin, Annette B.	3140
Informational Tariffs Filing Procedures	3335
International Communications Association	3317
J.C. Maxwell Broadcasting Group, Inc.	3218
KEZB, Inc.	3209
KGB Incorporated	3207
Kelly Broadcasting Company	3339
Malrite Guaranteed Broadcasting, Inc.	3191
Microband Corporation of America	3216
Naleszkiewicz, Nancy	3098
National Association of Business and Educational Radio, Inc.	3115
National Beeper, Inc.	3202
National Rural Telecommunications Cooperative	3213
North California Area Public Safety Plan	3144
Ogden Television, Inc.	3116
Operator Service Access and Pay Telephone Compensation	3251
Paulos, Lucinda Felicia	3145
Peel, William F., Jr.	3286

Case Name	Page
Petition for Declaratory Ruling - 900 Number Services	3167
Phalen, Shawn	3122
Pontchartrain Broadcasting Company, Inc.	3264
Ramar Communications, Inc.	3310
Reexamination on Comparative Broadcast Hearings Policy	3192
Reexamination on Comparative Broadcast Hearings Policy	3193
Requests for Extension of Time in Adjudicatory Cases	3309
Smoothline, Ltd.	3241
Southeast Mississippi Telephone Company, Inc.	3321
Table of Allotments, FM, Brownstown and Cannelton, IN	3173
Table of Allotments, FM, Canovanas, Culebra and Las Piedras, PR	3324
Table of Allotments, FM, Chester, SC (ERRATUM)	3248
Table of Allotments, FM, Corrales, NM	3247
Table of Allotments, FM, Dumas and Marianna, AR	3180
Table of Allotments, FM, East Ridge, TN	3106
Table of Allotments, FM, El Dorado and Waldo, AR	3195
Table of Allotments, FM, Hartford, VT	3245
Table of Allotments, FM, Hawkinsville, GA	3109
Table of Allotments, FM, Huntsville, TX	3111
Table of Allotments, FM, Lafayette, TN and Campbellsville, KY	3194
Table of Allotments, FM, Lincoln, IL	3184
Table of Allotments, FM, Los Alamos, NM	3249
Table of Allotments, FM, Maroa, IL	3183
Table of Allotments, FM, North Crossett, AR	3243
Table of Allotments, FM, Shingle Springs and Quincy, CA	3113
Table of Allotments, FM, St. Joseph, MN	3107
Table of Allotments, FM, Sulphur, OK	3182
Taylor, Robert B.	3142
Texas Communications Limited Partnership	3186
The Tellesis Partners	3168
Trentadue, Scott M.	3308
Trinity, Jim	3199
Virginia Communications, Inc.	3204
Wallace Communications Consultants	3333
Walton, Eugene	3237
Western States Broadcasting	3165
Word Communications	3201
Yankee Microwave, Inc.	3233

Federal Communications Commission Record

Table of Cases by Delegated Authority and FCC Number
Volume 7
Issue 11

Delegated Authority or FCC Number	Page	Delegated Authority or FCC Number	Page
DA 92 - 541	3335	DA 92 - 619	3248
DA 92 - 567	3315	DA 92 - 620	3324
DA 92 - 572	3106	DA 92 - 621	3249
DA 92 - 573	3107	DA 92 - 622	3212
DA 92 - 574	3109	DA 92 - 624	3213
DA 92 - 575	3144	DA 92 - 625	3202
DA 92 - 576	3111	DA 92 - 626	3204
DA 92 - 577	3135	DA 92 - 627	3243
DA 92 - 578	3140	DA 92 - 632	3218
DA 92 - 579	3313	DA 92 - 633	3224
DA 92 - 580	3321	DA 92 - 634	3317
DA 92 - 584	3142	DA 92 - 635	3216
DA 92 - 585	3113	DA 92 - 638	3233
DA 92 - 586	3119	DA 92 - 639	3331
DA 92 - 587	3115	DA 92 - 641	3309
DA 92 - 588	3116	DA 92 - 643	3241
DA 92 - 589	3121	DA 92 - 646	3339
DA 92 - 590	3167	FCC 92 - 170	3251
DA 92 - 593	3162	FCC 92 - 173	3266
DA 92 - 594	3165	FCC 92 - 174	3340
DA 92 - 595	3194	FCC 92 - 182	3123
DA 92 - 596	3195	FCC 92 - 183	3128
DA 92 - 597	3173	FCC 92 - 185	3225
DA 92 - 598	3180	FCC 92 - 213	3197
DA 92 - 599	3182	FCC 92 - 214	3209
DA 92 - 600	3183	FCC 92 - 216	3333
DA 92 - 601	3184	FCC 92 - 218	3237
DA 92 - 603	3201	FCC 92 - 219	3186
DA 92 - 604	3323	FCC 92 - 220	3190
DA 92 - 605	3320	FCC 92 - 223	3207
DA 92 - 606	3319	FCC 92 - 225	3310
DA 92 - 607	3318	FCC 92D - 33	3145
DA 92 - 608	3316	FCC 92D - 34	3304
DA 92 - 610	3168	FCC 92D - 35	3286
DA 92 - 612	3199	FCC 92I - 32	3192
DA 92 - 613	3191	FCC 92R - 38	3098
DA 92 - 614	3193	FCC 92R - 39	3101
DA 92 - 616	3210	FCC 92R - 40	3122
DA 92 - 617	3245	FCC 92R - 41	3264
DA 92 - 618	3247	FCC 92R - 42	3308

Federal Communications Commission Record

Table of Cases by Docket Number
Volume 7
Issue 11

Docket Number				Page
CC	Dkt.No.90	-	591	3098
CC	Dkt.No.91	-	35	3251
GC	Dkt.No.92	-	52	3192
GC	Dkt.No.92	-	52	3193
GN	Dkt.No.89	-	44	3128
GN	Dkt.No.90	-	287	3144
MM	Dkt.No.87	-	268	3340
MM	Dkt.No.87	-	342	3264
MM	Dkt.No.87	-	426	3122
MM	Dkt.No.88	-	358	3186
MM	Dkt.No.88	-	429	3237
MM	Dkt.No.89	-	85	3195
MM	Dkt.No.89	-	99	3243
MM	Dkt.No.89	-	570	3194
MM	Dkt.No.90	-	298	3145
MM	Dkt.No.90	-	523	3184
MM	Dkt.No.90	-	570	3197
MM	Dkt.No.91	-	17	3140
MM	Dkt.No.91	-	86	3286
MM	Dkt.No.91	-	112	3109
MM	Dkt.No.91	-	201	3308
MM	Dkt.No.91	-	204	3101
MM	Dkt.No.91	-	251	3248
MM	Dkt.No.91	-	259	3324
MM	Dkt.No.91	-	263	3249
MM	Dkt.No.91	-	271	3173
MM	Dkt.No.91	-	316	3247
MM	Dkt.No.91	-	343	3182
MM	Dkt.No.91	-	344	3183
MM	Dkt.No.91	-	357	3304
MM	Dkt.No.92	-	20	3113
MM	Dkt.No.92	-	22	3180
MM	Dkt.No.92	-	31	3106
MM	Dkt.No.92	-	92	3123
MM	Dkt.No.92	-	108	3107
MM	Dkt.No.92	-	111	3135
MM	Dkt.No.92	-	113	3111
MM	Dkt.No.92	-	114	3142
MM	Dkt.No.92	-	120	3245
PR	Dkt.No.92	-	80	3266

Federal Communications Commission Record

Table of Cases by Rulemaking Number
Volume 7
Issue 11

Rulemaking Number	Page
RM - 6406	3195
RM - 6640	3243
RM - 6789	3195
RM - 6826	3248
RM - 7061	3194
RM - 7110	3194
RM - 7309	3324
RM - 7426	3173
RM - 7495	3184
RM - 7580	3173
RM - 7645	3113
RM - 7666	3173
RM - 7712	3173
RM - 7739	3192
RM - 7739	3193
RM - 7740	3192
RM - 7740	3193
RM - 7741	3192
RM - 7741	3193
RM - 7748	3115
RM - 7793	3249
RM - 7834	3247
RM - 7856	3183
RM - 7858	3182
RM - 7891	3173
RM - 7892	3173
RM - 7893	3173
RM - 7898	3180
RM - 7908	3106
RM - 7909	3266
RM - 7942	3324
RM - 7943	3324
RM - 7944	3324
RM - 7948	3324
RM - 7968	3245
RM - 7970	3107
RM - 7982	3109
RM - 7983	3111

Table of Cases by City
Volume 7
Issue 11

City/State	Page	City/State	Page
Albuquerque, NM	3310	Idaho Falls, ID	3190
Appleton, WI	3216	Jackson, MS	3204
Bastrop, LA	3195	Jackson, MS	3218
Beaumont, TX	3186	Jupiter, FL	3142
Beaver Dam, KY	3173	Kingstree, SC	3248
Brownstown, IN	3173	Lafayette, TN	3194
Campbellsville, KY	3194	Lafayette, TN	3173
Campbellsville, KY	3173	Las Piedras, PR	3324
Cannelton, IN	3173	Las Vegas, NV	3224
Canovanas, PR	3324	Lincoln, IL	3184
Carthage, TN	3173	Los Alamos, NM	3249
Chester, SC	3248	Marianna, AR	3180
Christiansted, VI	3324	Maroa, IL	3183
Cleveland, OH	3191	Mayaguez, PR	3324
Corrales, NM	3247	Montecito, CA	3122
Crystal River, FL	3304	Munfordville, KY	3173
Culebra, PR	3324	New York, NY	3225
Des Moines, IA	3101	North Crossett, AR	3243
Dumas, AR	3180	Ogden, UT	3116
East Ridge, TN	3106	Quebradillas, PR	3324
Edinburgh, IN	3173	Quincy, CA	3113
El Dorado, AR	3195	Sacramento, CA	3339
El Paso, TX	3209	San Diego, CA	3207
Fernandina Beach, FL	3140	San Juan, PR	3324
Fredericksted, VI	3324	Santa Isabel, PR	3324
Garden Grave, CA	3165	Sebastopol, CA	3145
Germantown, TN	3237	Shingle Springs, CA	3113
Hammond, LA	3264	St. Joseph, MN	3107
Hartford, VT	3245	Sulphur, OK	3182
Hawkinsville, GA	3109	Summerton, SC	3248
Healdsburg, CA	3135	Vieques, PR	3324
Homosassa Springs, FL	3304	Waldo, AR	3195
Horse Cave, KY	3173	Washington, DC	3162
Huntsville, TX	3111	Wedgefield, SC	3248
		White City, FL	3286

Federal Communications Commission Record

Subject Index
Volume 7
Issue 11

Subject	Page
Adjudication	
Administrative Law Judge Decision	
Financial qualifications	3186
Integration of ownership into management, qualitative aspect	3237
Orders or Notices	
Lottery to select licensee	3140, 3142
Review Board or Commission Decision	
Air hazard	3304
Distribution of broadcast facilities	3304
Diversification of control of mass media	3145
Financial qualifications	3145
Integration of ownership into management,	3145, 3286
Noncommercial educational	3304
Real party in interest	3145
Reopening of record	3145, 3304, 3286
Broadcast Radio Services - General Rules	
Applications for authorization	
Amendment of applications	3186
Changes, renewals in existing stations	
Assignment or transfer of control, application for voluntary	3209
Construction permits	
Extension/replacement, application for	3340
Period of time for construction	3340
Licenses and permits	
Multiple ownership of broadcast stations	3340, 3310, 3209
Operation of station	
Power and mode tolerance, operating	3165
Policies of the FCC	
Character evaluation of broadcast applicants	3225
Educational broadcast stations, non-commercial nature of	3218
Format changes of stations	3225
Program contents	
Lottery information	3224
Telephone conversations for broadcasting, recording of	3191
Records kept by stations	
Equal employment opportunity program	3225

FEDERAL COMMUNICATIONS COMMISSION

Subject	Page
Broadcasting - FM Stations	
Allotments and assignments	
Allotments, table of	3106, 3107, 3109, 3111, 3113, 3194, 3195, 3173, 3180, 3182, 3183, 3184, 3249, 3324, 3248, 3247, 3245, 3243
Broadcasting - Noncommercial Educational FM	
Applications and licenses	
Licensing requirements	3218
Broadcasting - TV Stations	
Allocations/assignments/licenses	
Distance separations between stations, minimum	3116
General information	
Scope: includes NCE-TV, TV, low power TV, TV translator	3340
Services	
Affiliations; network program practices; territorial exclusivity	3340
Carriers: Service Altered	
Extensions and supplements	
Applications, contents of	3119
Commission Organization	
Delegations of authority - Field Operations Bureau	
Commission en banc, matters to be referred to the	3121
Privacy Act regulations	
Records totally/partially exempt	3123
Communications Act of 1934	3213
Common Carriers	
Charges, schedules of	3333
Complaints to the commission	3213, 3333
Discrimination and preferences	3204, 3213
Extension of lines, certificate for	3119
Penal provisions; forfeitures	
Rebates and offsets, forfeitures in cases of	3207, 3191, 3218
Radio, provisions relating to	
Sanctions, administrative	3162
Domestic Public Fixed Radio Services	
Applications and licenses, filing requirements	
Amendment of applications	3216
Requirements, general application	3204, 3233

Subject	Page
Applications and licenses, processing	
Opposition to applications	3204, 3233
Ownership changes/agreements to amend or dismiss pleadings/applic	3216
Multipoint distribution service	
Eligible, those common carriers	3204
Frequencies available for assignment	3204
Frequency Allocations and Radio Treaty Matters	
Allocation, assignment, and use of radio frequencies	
International and U.S. table of frequency allocations	3266
Equipment authorization procedures: application procedures	
Identification of equipment	3162
Equipment authorization procedures: conditions on grants	
Grantee for facts regarding equipment, responsibility of	3241
Marketing of radiofrequency devices	
Devices not approved, limitations on radiofrequency	3162
Jurisdictional Separations Procedures	
Facilities and property	
C&WF(Category 1),apportionment procedures in exchange line	3313
Practice and Procedure	
Application procedures, general	
Information furnished by applicants, changes in	3233
Common carriers: complaints, formal	
Issues amd facts, statement of	3333
Common carriers: grants by random selection	
Multichannel multipoint distribution service	3266
Fees filed with Commission: schedules: general information	
Radio broadcast services	3190
Hearing proceedings: participants and issues	
Issues, motions to enlarge/change/delete	3186
Hearing proceedings: presiding officer	
Disqualification of presiding officer	3098
Pleadings, briefs	
Extension of time, motions for	3192, 3193
Pleadings and filing periods, provisions regarding	3309
Proceedings, miscellaneous	
Forfeiture proceedings	3162, 3165
Reconsideration/review of Commission action	
Actions by delegated authority, application for review of	3237
Reconsideration of a final FCC action, petition for	3116, 3264

Subject	Page
Private Land Mobile Radio Services	
Frequencies or bands, standards for special	
450-470 MHz band are assignable, frequencies separated by 12.5kHz	3115
Public Mobile Service	
Applications and licenses-processing	
Construction, time period allowed for	3202
Public land mobile service	
Frequencies, assignment of	3201
Radio Frequency Devices	
Lowpower communication devices: general requirements	
Between 49.82-49.90 MHz, alternative specifications for the band	3340
Lowpower specific devices: cordless telephones	
Technical specifications	3241
Special Broadcast Services	
Low power TV and TV translator stations	
Definitions-lptv/tv translators	3340
Rules applicable to services authorized under Part 74	
Scope of Part 74	3340

TABLE OF STATUTORY AND RULE PROVISIONS

	Page
000.311 - Delegation of Authority, FOB	3121
001.045 Pleadings; filing periods	3309
001.046 Motions for extension of time	3192
001.046 Motions for extension of time	3193
001.065, Changes in information furnished by applicants	3233
001.080 Forfeiture Proceedings	3162
001.080 Forfeiture Proceedings	3165
001.106 Petitions for reconsideration	3116
001.106 Petitions for Reconsideration, Denied	3264
001.1107 Payment of charges	3190
001.1111 Return or refund of charges	3190
001.115 Application for Review	3237
001.229 Motions to enlarge, change, or delete issues	3186
001.245 Disqualification of Presiding Officer Denied	3101
001.245 Disqualification of Presiding Officer, Denied	3098
001.301 Appeal Dismissed	3101
001.302 Appeal Deferred	3308
001.720 General pleading requirements	3213
001.722 Damages	3333
001.773 Petitions Against New Tariff Filings	3318
001.773 Petitions Against New Tariff Filings	3323
001.824 Random selection procedures for Multipoint Distribut	3266
002.106 Table of frequency allocations	3266
002.803 Equipment requiring Commission approval	3162
002.925 Identification of Equipment	3162
002.931 Equipment Authorization	3241
015.119 Closed caption decoder requirements for television r	3340
015.233 Cordless Phones	3241
021.013(a) Real-party-in-interest rule	3204
021.013, General application requirements	3233
021.023 Amendment of applications	3216
021.029 Ownership changes	3216
021.030 Opposition to Applications	3204
021.030, Opposition to applications	3233
021.900 Eligibility	3204
021.901(d)(2) One-to-a-market rule	3204
022.501 Frequencies	3201
036.125, §36.154, Part 36 Appendix-Glossary	3321
036.125, 0.154, Part 36 Appendix-Glossary	3313
063.001 Contents of Application	3119
064.711 Preamble	3331
073.1206 Unauthorized Telephone Call Broadcasts	3191
073.1211 Broadcast of Lottery Information	3224
073.1560 Operating power and mode tolerances	3165
073.1615 Operation during modification of facilities	3165
073.1941 Equal Opportunities	3199
073.202 FM Table of Allotments	3106
073.202 FM Table of Allotments	3107
073.202 FM Table of Allotments	3109
073.202 FM Table of Allotments	3113

073.202 FM Table of Allotments 3173
073.202 FM Table of Allotments 3180
073.202 FM Table of Allotments 3182
073.202 FM Table of Allotments 3183
073.202 FM Table of Allotments 3184
073.202 FM Table of Allotments 3194
073.202 FM Table of Allotments 3195
073.202 FM Table of Allotments 3243
073.202 FM Table of Allotments 3245
073.202 FM Table of Allotments 3247
073.202 FM Table of Allotments 3248
073.202 FM Table of Allotments 3249
073.202 FM Table of Allotments 3324
073.3522 Amendment of applications 3186
073.3534 Application for extension of construction permit or 3340
073.3540 Application for Voluntary Assignment or Transfer of 3209
073.3555 Multiple Ownership 3209
073.3555 Multiple Ownership 3310
073.3555 Multiple ownership 3340
073.3598 Period of construction 3340
073.4163 Noncommercial Nature of Ed. B/C Stations 3218
073.503 Noncommercial FM Service; Promotional Announcements 3218
073.601 Scope - Television Broadcast Stations 3340
073.610 Minimum distance separations between stations 3116
073.658 Affiliation agreements and network program practices 3339
073.658(g) Dual network operation 3340
073.670 Commercial limits in children's programs 3197
073.671 Educational and informational programming for childr 3197
074.001 Scope - Experimental, Auxiliary, and Special Broadca 3340
074.701 Definitions - Low Power TV, TV Translators, and TV B 3340
090.267 Assignment and use of 12.5 kHz frequency offsetts 3115
300.154 Provisions Relating to the Commission 3213
300.202 Discrimination and Preferences 3213
300.202(a) Discrimination and Preferences 3204
300.203 Schedules of Charges 3333
300.208 Complaints to the Commission 3213
300.208 Complaints to the Commission 3333
300.214 Extension of Lines 3119
300.301 License for Radio Communication or Transmission of E 3165
300.312 Administrative Sanctions 3162
300.315 Facilities for candidates for public office 3199
300.399B Public B/C Stations; Advertisements 3218
300.503(b) Forfeitures (Notice of Apparent Liability 3191
300.503(b) Forfeitures (Notice of Apparent Liability 3207
300.503(b) Forfeitures (Notice of Apparent Liability 3218
302 Marketing 3241
400.181464 Broadcasting Obscene or Indecent Language 3207
47 C.F.R. Section 0.291 delegated authority 3315
47 C.F.R. § 64, Misc. Rules Relating to Common Carriers 3251
47 CFR Sec. 0.561, Exemptions 3123
47 CFR § 64. Misc. Rules Relating to Common Carriers 3167
47 CFR § 69, Access Charges 3210
500.100 3135
500.100 3140

500.100 3142
500.2005 - Integration/Qualitative 3145
500.2035 - Integration/Quantitative 3145
500.2035 Integration of Ownership into Management, Quantitat 3286
500.2040 Integration of Ownership into Management, Effectuat 3286
500.2045 - Diversification 3145
500.2085 - §307(b), Distribution of Broadcast Facilities 3304
500.2090 - Noncommercial Education 3304
500.2095 - Character Qualifications 3145
500.2110 Failure to Prosecute (Improper Prosecution) 3286
500.2135 - Real Party In Interest 3145
500.2145 - Air Hazard 3304
500.2170 - Financial Qualifications 3145
500.3005 Integration of Ownership Into Management Qualitativ 3237
500.3035 Integration of Ownership Into Management Quantitati 3237
500.3170 financial qualifications 3186
Consent Decree 3168
DA 92-574, 5-13-92 3109
DA 92-579 Memorandum Opinion and Order 3313
DA 92-580 Memorandum Opinion and Order 3321
NPRM, FM B/C STAS. (Huntsville, TX), DA 92-576 3111
Order; AT&T Transmittal 3977; DA 92-607 3318
Part 61 - amend to have tariff include service quality stand 3317
RM-7967, AAD 92-39, DA 92-634 3317
Section 1.773 Petitions Against New Tariff Filings 3316
Section 1.773 Petitions Against New Tariff Filings 3319
Section 1.773 Petitions Against New Tariff Filings 3320
Section 22.43(b) Extensions of time to construct 3202
Study Area Definition 3313
Study Area Definition 3321

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 1094-CL-P-430-A-89

For a Construction Permit to establish a new cellular system to operate on Frequency Block A in the Domestic Public Cellular Telecommunications Radio service to serve the Kansas - 3 (Jewell) Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: May 7, 1992; **Released: May 20, 1992**

By the Review Board: MARINO (Chairman), and BLUMENTHAL; Board Member ESBENSEN absent.

1. The Board has before it the "Appeal And Contingent Request For Suspension Of Hearing" filed by the above-captioned applicant on April 17, 1992. It also has before it the "Comments" of the Commission's Common Carrier Bureau, filed April 21, 1992.

APPEAL

2. Appellant seeks relief, pursuant to Section 1.245(b)(3) of the Commission's Rules, 47 CFR Section 1.245(b)(3),[1] from the *Memorandum Opinion and Order*, FCC 92M-438 (*MO&O*), released April 10, 1992 by Administrative Law Judge Edward J. Kuhlmann (ALJ). In the subject *MO&O*, the ALJ (1) denied appellant's motion for continuance of the remand hearing (originally) scheduled to commence on May 6, 1992;[2] and (2) denied appellant's motion that the ALJ voluntarily withdraw as the presiding officer in this licensing proceeding.[3] In light of that latter denial, appellant here argues that the Board should override and disqualify the ALJ for personal bias because his prior order dismissing appellant's application purportedly reflects a predisposition on the question of whether appellant has been altogether truthful with the Commission.

3. The Commission's Common Carrier Bureau opposes the appeal in every respect, asserting that appellant has not demonstrated that the ALJ "harbors a personal bias against her," that his June 1991 *Order* dismissing her application "was based on a reasonable evaluation of the evidence that was before him at that time," and that "[t]here is no reason to believe that he [ALJ] is unable or unwilling to conduct a full and fair hearing..." or to objectively evaluate the evidence adduced at the remand hearing.[4]

BACKGROUND

4. The instant dispute had its origins when, on June 4, 1991, Judge Kuhlmann summarily dismissed appellant's application based, in principal part, on his retrospective view that appellant had, in technical terms, failed to show "good cause" for her failure to file a timely notice of appearance for the originally scheduled evidentiary hearing. *See Nancy Naleszkiewicz*, FCC 91M-1790, released June 4, 1991 (ALJ) (*Dismissal Order*).[5] Therein, and based upon documents produced during discovery, the ALJ, in essence, rescinded his previous acquiescence in the claim that appellant was utterly ignorant of her legal duty to timely file a notice of appearance, and he summarily dismissed her application after holding that her prior representations to that effect had been disingenuous.

5. Upon appeal of that summary dismissal, and in obligatory deference to the "broad discretion" the Commission routinely reposes in its ALJs to properly superintend the course of agency hearings, *see generally Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 (1986), this Board agreed with the Commission's Common Carrier Bureau that, based upon the evidence before the ALJ at that time, no egregious abuse of discretion was apparent.[6] The Board, therefore, denied the appeal of the ALJ's summary dismissal. *Nancy Naleszkiewicz*, 6 FCC Rcd 4829 (Rev. Bd. 1991).

6. In its review of the subordinate actions below, the full Commission (Marshall, dissenting) disagreed with the ALJ, the Common Carrier Bureau and the Board that the record evidence supported a summary dismissal, and it remanded the proceeding to the ALJ "in the first instance to decide whether there is sufficient reason to add a [separate] misrepresentation issue against the applicant. "*Nancy Naleszkiewicz*, 7 FCC Rcd 1797, 1799 (1992). By *Memorandum Opinion and Order*, FCC 92M-357, released March 23, 1992, the ALJ duly considered the Commission's remand order, and he enlarged the proceeding by adding a discrete issue to compile evidence on whether appellant was, in fact, disingenuous in her prior representations anent her late-filed notice of appearance. Thereupon, appellant sought from the ALJ his voluntary withdrawal; and, following his declination, appellant lodged the instant appeal with the Board pursuant to Section 1.245(b)(4) of the Rules.

DISCUSSION

7. In reviewing Section 1.245 appeals, the Commission substantially adheres to the principles applied in federal adjudications, to wit:

> In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See WWOR-TV, Inc.*, 4 FCC Rcd 6155, 61554 (1989), citing *Berger v. United States*, 225 U.S. 22, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgement"). To be disqualifying the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

WWOR-TV, Inc., 5 FCC Rcd 2845 (1990). *Accord, Mableton Broadcasting Co., Inc.*, 6 FCC Rcd 396 (Rev. Bd. 1991).

8. Despite the Supreme Court's language in *Grinnell Corp.*, however, the Commission itself has opined that:

> given the difficulty of establishing an extrajudicial source of bias, the Commission has held that "the comments and rulings of the trier of fact may be relevant to the existence of prejudice."

WWOR-TV, at 2845-46 (internal citations omitted). Thus, under Commission doctrine, at least, our review of Section 1.245 appeals may encompass matter that is *not* "extrajudicial" in giving vent to litigant claims of ALJ bias. This latter point is critical here, because our appellant has nowhere alleged any conduct by the ALJ that could be labeled "extrajudicial" evidence of bias.

9. Rather, appellant roots her argument exclusively in the fact that, in his June 1991 *Dismissal Order*, the ALJ did not credit her stated excuse for her undisputed failure to timely file a notice of appearance. She succinctly contends:

> The central point in this appeal is basic and compelling: the ALJ cannot unmake his statement that the Applicant lied to the Commission. He cannot eliminate the personal distaste so evident in his dismissal order. He cannot change the tenor of that order which is contemptuous and dismissive of the Applicant. Bearing the burden of proof, she will now be forced to convince the ALJ that his prior determinations, which go to the heart of the issues in this case, were incorrect, a task which common sense alone indicates will be unfairly difficult to accomplish. To proceed on these issues before the same ALJ condemns the Applicant to a hostile Judge whose demeanor and credibility findings -- like all such findings -- are entitled to great weight on appeal.

Appeal at 4. On that singular basis, appellant submits that the ALJ's personal bias is manifest and his removal imperative to an impartial adjudication.

10. Because the circumstances before the Board are rather uncommon in its experience,[7] we have researched deeply into the question of whether a prior adverse ruling on the same question in the same case constitutes a sufficient basis upon which to infer irredeemable bias. The seminal case on this precise point is *Withrow v. Larkin*, 421 U.S. 35 (1975), which in turn relies on the much older *FTC v. Cement Institute*, 333 U.S. 683 (1943). In *Withrow*, the Court stated:

> No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact.
>
> * * *
>
> Certainly it is not the rule of judicial administration that...a judge is disqualified from sitting in a retrial because he was reversed on earlier rulings. *We find no warrant for imposing upon administrative agencies a stiffer rule, whereby examiners would be disentitled to sit because they ruled strongly against a party in the first hearing.*
>
> * * *
>
> [I]t is not contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around.

421 U.S. at 48-49, 56 (emphasis added), quoting *FTC v. Cement Institute*, 333 U.S. at 702-03 and *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 236-37 (1947).[8]

11. Apart from a fleeting excerpt from the *Rubaiat of Omar Khayyam*,[9] the 5-page appeal before us invokes no authoritative precedent at odds with *Withrow* and the *corpus juris* we have referenced in note 8 of our margin. In fact, there would appear to be lesser grounds for disqualification in our particular situation since, in contrast with virtually all of the pertinent precedent, the ALJ has yet to hold a full evidentiary hearing on the merits of the subject issue.[10] As the ALJ here observed when declining to disqualify himself:

> Naleszkiewicz will now be given an opportunity to place all the facts on the record and her demeanor will be observed. All actions in this case have been on the record and have been based on written documents. If the conclusion ultimately reached is not accepted by any party, there are two opportunities for review of that action and the record by other Commission employees and officials.

MO&O at para. 5. Neither appellant nor the Board has any compelling reason at this point to believe that the ALJ will not afford appellant a generous opportunity to place upon the record all relevant and favorable evidence, or that he is incapable of rendering a dispassionate judgment on the subject issue(s).11

12. ACCORDINGLY, IT IS ORDERED, That the "Appeal and Contingent Request for Suspension of Hearing," filed April 17, 1992 by Nancy Naleskiewicz IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Appeals from determinations by an ALJ on applicant requests to withdraw are now directed to the Board for initial disposition. *Review of Motions to Disqualify Presiding Officer*, 5 FCC Rcd 5366 (1990).

[2] Although appellant has additionally prayed for a suspension of the scheduled hearing, appellant correctly notes that:

> Pursuant to Section 1.245(b)(4) of the Commission's Rules, the commencement of the hearing shall be suspended pending Review Board consideration of this appeal. However, under the Rules, any further appeal to the Commission does not automatically suspend the commencement of the hearing, now scheduled to begin on May 6, 1992.

Appeal at 5 n.6. The Board finds no special basis here upon which to disregard the ordinary procedures specified by the Commission's Rules.

[3] *See* "Request For Withdrawal Of Presiding Judge," filed March 26, 1992.

[4] Bureau Comments at 2.

[5] For a thoroughgoing discussion of the underlying substance of this proceeding, *see Hearing Designation Order*, 5 FCC Rcd 7131 (1990). In brief, however, the captioned cellular system application was set for an evidentiary hearing before Judge Kuhlmann to determine whether appellant was complictious in the allegedly fraudulent operation of an "application mill," Genesis Enterprises, Ltd. Pursuant to a plea bargain agreement, neither appellant nor her husband would be fully prosecuted for multiple violations of the Criminal Code; rather, should appellant be found qualified for the instant permit, she would immediately "sell" the Construction Permit to a third party, with a portion of the proceeds going to the "victims" of the alleged federal fraud. *See id.*, at 7133-35.

[6] The Board did not find fatal the fact that the ALJ had not held a full evidentiary hearing on appellant's unsupported excuse for her late appearance. *See generally St. Louis Railway v. Henwood*, 157 F.2d 337, 342 (8th Cir. 1946) (conflicts between testimony and documents "speak from their face" and demeanor is of little use), *cert. denied*, 303 U.S. 836 (1947), cited in *Millar v. FCC*, 707 F.2d 1530, 1539 (D.C. Cir. 1983). Nonetheless, appellant will here be given a second and totally unfettered opportunity to make a persuasive showing of her alleged ignorance of the Rules.

[7] More typically, Section 1.245 appeals are lodged purely because an applicant disagrees with an ALJ's threshold ruling to add or, conversely, not to add an issue, or because an ALJ has uttered language skeptical of a particular claim. *See, e.g., Mableton Broadcasting, supra* (and cases cited therein).

[8] For a comprehensive analysis of this very point, *see* 22 ALR Fed. 709 *et seq.* (DISQUALFICATION OF ORIGINAL TRIAL JUDGE TO SIT ON RETRIAL AFTER REVERSAL OR MISTRIAL; FEDERAL CASES).

[9] *See* Appeal at 2, quoting Edw. Fitzgerald (*transl.*):

> The Moving Finger writes; and, having writ, Moves on; nor all your Piety nor Wit Shall lure it back to cancel half a line Nor all your Tears wash out a Word of it.

Our own research, however, "Fresh from brawling courts and dusty purlieus of the law" (Tennyson, *In Memoriam*, 89, st. 3), finds utterly no jurisprudential buttress for appellant's lyrical entreaty. *Compare Withrow v. Larkin, supra; U.S. v. Barnes*, 909 F.2d 1059, 1072 (7th Cir. 1990); *Panzardi-Alvarez v. U.S.*, 879 F.2d 975, 981 (1st Cir. 1989).

[10] It is reiterated that the ALJ based his June 1991 *Dismissal Order* solely upon a summary evaluation of the demonstrative evidence provided by appellant herself, compared that evidence with appellant's general denial of FCC procedural requirements, and dismissed her application on procedural grounds. By remanding the case back to the ALJ, the Commission has afforded appellant a second and open-ended opportunity to demonstrate the *bona fides* of her claims of ignorance of the law, an extraordinary opportunity not unprecedented in non-comparative common carrier application proceedings. *See, e.g., TeleSTAR, Inc.*, 2 FCC Rcd 7352 (1987)(subsequent history omitted). There, too, an applicant claiming legal ignorance was afforded a supplemental hearing, following adverse holdings by both the ALJ and the Board.

[11] In the interest of expediency, we believe the ALJ's *Initial Decision* should encompass findings and conclusions on the *entirety* of the issues now designated against the appellant, thus simplifying and consolidating any requests for appellate review.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-204

In re Applications of

CENTER FOR STUDY AND APPLICATION OF BLACK ECONOMIC DEVELOPMENT — File No. BRED-900131OA

For Renewal of License of
Station KUCB-FM,
Des Moines, Iowa

IOWA ACORN BROADCASTING CORPORATION — File No. BPED-900102MB

For Construction Permit for
New FM Station on Channel 207,
Des Moines, Iowa

MINORITY COMMUNICATIONS, INC. — File No. BPED-900116MA

For Construction Permit for
New FM Station on Channel 207,
Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1992; **Released: May 20, 1992**

By the Review Board: MARINO (Chairman), BLUMENTHAL, and GREENE

1. Center for Study and Application of Black Economic Development, an applicant for renewal of its license to operate noncommercial FM Broadcast Station KUCB-FM, Des Moines, Iowa, has appealed the *Memorandum Opinion and Order* of Administrative Law Judge Richard L. Sippel, FCC 92M-288 (released March 6, 1992) (*Disqualification Order*), which denied Center's Motion for Disqualification of Presiding Officer. That motion was filed on or about March 3, 1992, and the appeal was filed March 5, 1992. Because the appeal was timely filed, the ALJ certified the question of his disqualification to the Review Board and suspended the hearing. *Order*, FCC 92M-298 (released March 9, 1992) (*Certification Order*).[1] Center filed a Second Motion to Disqualify Presiding Judge on March 12, 1992, a Second Amended Motion to Disqualify Presiding Judge on March 30, 1992, and another Second Amended Motion to Disqualify Presiding Judge on April 22, 1992. In *Order*, FCC 92M-498 (ALJ released April 27, 1992), the ALJ certified the most recent Second Amended Motion to Disqualify Presiding Judge to the Review Board. Because the ALJ's jurisdiction had passed to the Board with his earlier certification order, all of Center's motions and amendments regarding the presiding officer's disqualification are before the Board.

2. In addition, Center has filed an interlocutory appeal of rulings adverse to Center in *Order*, FCC 92M-263 (ALJ released February 27, 1992) (*February 27 Order*), and *Memorandum Opinion and Order*, FCC 92M-264 (ALJ released February 28, 1992) (*February 28 Order*). The *February 27 Order* set up a prehearing status conference for March 5 by telephone and noted that Center was in default for failing to appear at the Admissions Session held on February 25, 1992, and for failing to submit sworn written testimony on February 11, 1992, as required by the ALJ. The *February 28 Order* addressed the default. Because Center provided only brief summaries of the expected testimony of seventeen persons, not all of whom were named, in lieu of the sworn testimony required by the ALJ, the ALJ granted the February 18, 1992, motion of Iowa Acorn Broadcasting Corporation to exclude the testimony of these seventeen parties from Center's direct case.[2] *Id.* at ¶ 5. Because Center did not appear at the Admissions Session, its proposed hearing exhibits, which had been exchanged, were not admitted into evidence.[3] The ALJ said Center could present argument at the hearing as to why its exhibits going to basic qualifications should be admitted, but that it would have a heavy burden. *Id.* at ¶ 6. The ALJ limited Center's participation in the hearing to offering rebuttal to the Bureau's case-in-chief on the disqualifying issues against Center and limited rebuttal witnesses to Center's past or present employees or principals. *Id.* at ¶ 7 and n.1. As a result of these rulings, Center would be limited only to rebuttal evidence on the disqualifying issues for which it bears the burden of proceeding and proof under the *Hearing Designation Order*,[4] and it would not be permitted to adduce evidence on renewal expectancy or its comparative case. *February 27 Order*, n.2, and testimony from members of the public relevant to KUCB(FM)'s broadcasting activities no longer would be relevant.[5] *See also February 27 Order* at n.3. Furthermore, because Center had not timely served notices to cross

[1] On March 4, 1992, Center filed an Interlocutory Appeal to the Chief Administrative Law Judge. This was dismissed by the Chief ALJ in *Order*, 92M-290 (ALJ released March 6, 1992), as beyond his jurisdiction.

[2] Center responded to the Motion on February 18, 1992. *See February 28 Order* at ¶ 5. Counsel for Iowa Acorn Broadcasting Corporation, Minority Communications, Inc., and the Bureau represented at the Admissions Session that the summaries were useless for preparing cross examination and that affidavits Center had promised still had not been provided. *Id.* at ¶ 4; Tr. 211, 212, 214.

[3] The exhibits were not paginated as required by the ALJ, which the ALJ cited as an additional reason for not admitting the exhibits. *February 28 Order* at ¶ 6.

[4] 6 FCC Rcd 4622, 4624 ¶ 16(a)-(g) (1991).

[5] The ALJ modified this restriction in *Order*, FCC 92M-272 (released March 3, 1992), *Erratum* (issued March 3, 1992), to allow relevant testimony from public witnesses and to give Center an opportunity to rebut any such testimony. *See also Memorandum Opinion and Order*, FCC 92M-282, ¶ 10 (ALJ released March 6, 1992) (*Reconsideration Order*).

examine witnesses, it would not be able to cross examine the witnesses Iowa Acorn and Minority Communications, Inc., planned to call. *Id.*

THE MOTIONS TO DISQUALIFY

3. When considering appeals under section 1.245 of the Commission's Rules, the Board is guided by standards the Commission has developed for resolving bias claims. These standards have been reflected in cases such as *Catalina Radio*, 5 FCC Rcd 3710, 3710 ¶¶ 4-5 (1990), and *WWOR-TV, Inc.*, 5 FCC Rcd 2845, 2845-46 ¶¶ 5-6 (1990). In those cases the Commission explained that, to disqualify the Presiding Judge, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See Berger v. United States*, 255 U.S. 22, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment"). The Commission further explained that, to be disqualifying, the alleged bias "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case."*United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966). The burden is on the litigant making the allegation, and it is a heavy one that should be met by an affidavit "setting forth in detail the facts alleged to constitute the grounds for disqualification." 47 C.F.R. § 1.245(b)(1).

4. In addition, although unfavorable interlocutory rulings may be relevant to a claim of prejudice, they will not, by themselves, afford a basis for disqualifying the Presiding Officer. *Catalina Radio* and *WWOR-TV, supra*, citing *Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501-02 ¶ 6 (1977). The Commission has given two reasons for this view. One is that the Commission presumes that its administrative law judges will discharge their duties fairly and impartially and, thus, has given them broad discretion to regulate the course of comparative proceedings. *See Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419, 419 ¶ 3 (1987). The other is that adverse rulings can be appealed after release of the initial decision, and any errors of fact or law can be corrected on review. *See Barnes, supra.* However, because it recognizes that establishing an extrajudicial source of bias is difficult, it has acknowledged that the comments and rulings of a presiding judge may be relevant to determining the existence of prejudice. *See Catalina Radio* and *WWOR-TV, supra*, citing *WWOR-TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989), and *KAYE Broadcasting, Inc.*, 35 FCC 2d 548, 548 ¶ 3 (1972).*See also Nancy Naleszkiewicz*, FCC 92R-38 ¶¶ 7-8 (adopted May 7, 1992).

5. Center does not assert that the ALJ's bias is demonstrated by documents or discussions involving an extrajudicial source. It relies on the harshness of the ALJ's rulings restricting its direct case in its Motion to Disqualify[6] and, in its later pleadings, points to the ALJ's comments and rulings during the February 25 Admissions Session and the March 5 status conference as demonstrations of bias.[7] Center sees these rulings4as overly harsh in light of actions it explains as misunderstandings and technical procedural errors.[8] One such misunderstanding apparently was the purpose of the Admissions Session that Center missed. In its original Motion to Disqualify, Center refers to the ALJ's October 2, 1991, *Order*, FCC 91M-3002 (released October 3, 1991) (*Prehearing Order*), which provided for an Admissions Session on February 25, 1992, "to include rulings on requests for cross-examination and requests for rebuttal witnesses." Center appears to be arguing that, in light of this language, it expected its summaries would be sufficient for the purpose of planning witnesses at the Admissions Session. But, in its Motion to Disqualify, Center has not been clear about what it misunderstood.[9] As the ALJ pointed out in denying Center's Motion to Disqualify, he ordered an exchange of written testimony in his *Prehearing Order* and Center provided only terse summaries. He set up an Admissions Session and Center did not appear. *Disqualification Order* ¶ 4.[10] Center also appears to take exception to the other applicants' argument during the Admissions Session that Center's witness summaries were useless for trial preparation, an argument referenced in the ALJ's *February 28 Order* at ¶ 4. The ALJ

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[6] Center's Appeal simply incorporates its Motion to Disqualify. No additional arguments are made there.

[7] Center also alleged that counsel for the Commission is biased and contributed to an air of bias by her comments to the media. In support of this argument, Center submitted a copy of an article appearing in the *Des Moines Register* on February 26, 1992, in which Bureau counsel was quoted as saying that Center "'doesn't have a case because it doesn't have any testimony. There's nothing in the record for them,' she said, as a result of [Center Counsel's] failure to appear Tuesday" at the Admissions Session. Center Ex. 1 to Motion for Disqualification, p. 1. Counsel for the Commission to whom Center refers is counsel for the Commission's Mass Media Bureau, a party to the proceeding in an adversary relationship with Center on the disqualification issues designated against Center in the *Hearing Designation Order*, 6 FCC Rcd at 4624 ¶ 16(a)-(g). Bureau Counsel's role is to advocate the Bureau's position regarding Center's qualifications, just as Center counsel's role is to advocate Center's position through the presentation of oral and written evidence, testimony, and argument on the record to the ALJ. *Cf.* Administrative Procedure Act § 554(d), 5 U.S.C. § 554(d) providing for the separation of decision-making and prosecutorial personnel. Neither Bureau Counsel's advocacy on the procedural question of Center's default nor comments about the significance of the ALJ's order attributed to her by the press are relevant to our review of the bias alleged on the part of the ALJ without some showing that an experienced ALJ, who has seen the article, would be incapable of rendering an impartial decision on the record before him. Proceedings such as this one are open to the public, and local press interest is to be expected. Nothing cited by Center suggests that quotations in the Des Moines press from Bureau counsel--or Center's counsel--have undermined the Presiding Officer's impartiality in this proceeding.

[8] We are denying Center's request for a hearing on the Motion to Disqualify. Although hearings are permitted by 47 C.F.R. § 1.245(b)(5), none is needed here. Center is relying exclusively on matters in the record before the Commission as support for its motion. There are no substantial and material questions requiring a hearing.

[9] In its Application for Review filed March 24, 1992, it argues that it did not understand that exhibits were to be admitted and that the ALJ did not allow a reasonable period for the orderly completion of prehearing procedures. The ALJ's *Prehearing Order* was issued October 3, more than four months before written summaries were due and the Admissions Session was held.

[10] At the October 1, 1991, prehearing conference in which Center was an active participant, the ALJ explained that he would rule on the admission of the parties' sworn written testimony and, at the same time, rule on opposed requests for cross examination. Specifically, the ALJ said:

pointed out that he considered all the facts and circumstances concerning Center's summaries when making his ruling. *Disqualification Order* at ¶ 6. His doing so does not support Center's argument that his ruling was based on bias rather than the problems created by Center's failure to comply with his written testimony requirement just two weeks before hearing.[11]

6. The other misunderstanding Center cites is counsel's expectation that he could participate in the Admissions Session by speakerphone, which the ALJ refused to allow at time of the Session "for no discernible, good cause reason" in Center's view. Motion for Disqualification at 3. Again we disagree that this ruling was based on bias against Center. The ALJ explained in his *Reconsideration Order* at ¶ 9 that the Commission's Rules require advance authorization from the presiding officer for participation by speakerphone. *See* 47 C.F.R. § 1.248(f), which requires a written request from a party and gives the ALJ discretion to approve use of a speakerphone "if such use is found to conduce to the proper dispatch of business and the ends of justice." In his *Reconsideration Order* at ¶ 9, the ALJ explained why speakerphone participation at the Admissions Session would not have met this standard. He further explained he had no reason to suspect that Center's counsel would not appear and fully participate. The ALJ was already in the courtroom for a 9:30 a.m. session when the call from the office of Center's counsel was received in chambers at approximately 9:35. *See* Tr. 160. The ALJ learned of the call during an 11:00 a.m. recess and told his secretary to relay the message that the session was not in a courtroom that could accommodate a speakerphone, that he was in the Admissions Session and would not take an *ex parte* telephone call even about scheduling while it went on, and that he was going forward with the Session. *Id.* Administrative law judges have broad discretion to control their proceedings, *see Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶ 3, and we will not infer bias from the face of rulings within that discretion.[12]

7. Center also argued that the ALJ showed prejudice when he stated that public witness testimony is irrelevant under any issue, a ruling that Bureau counsel questioned by letter from Charles E. Dziedzic, Chief, Hearing Branch, FCC Mass Media Bureau, to ALJ Richard L. Sippel on February 26, 1992, and the ALJ revised in *Order*, FCC 92M-272 (released March 3, 1992) and *Erratum* issued March 3, 1992. Although the ruling may have been too broad, we do not see bias as the basis for it. The ALJ had initially perceived that public witness testimony would be directed only to Center's renewal expectancy, an issue that he did not expect to try in light of Center's failure to present written testimony. For this reason, the ALJ had initially considered such public witness testimony to be irrelevant. But, erroneous adverse rulings are not a basis for disqualification.

8. In its Second Motion to Disqualify Presiding Judge, filed March 12, 1992, Center alleges that the ALJ showed additional bias toward Center during the March 5, 1992, prehearing conference when, according the Center, he denied Center's proffer regarding critical evidence, cut off Center's counsel without allowing him to finish points he was making although opposing counsel were allowed to make their points, admonished Center's counsel to "pay attention" at one point toward the end of the hearing, and through his tone and attitude showed "fraternizm" toward Bureau counsel. Center asked that the tape of the hearing be reviewed to discern the inflection and tone of the ALJ's voice. Center provided transcript cites to the alleged interruptions and an affidavit from Center's legal assistant regarding the admonition in its Amended Second Motion to Disqualify Presiding Judge filed March 30, 1992. According to the affidavit from counsel, counsel was listening to the ALJ and showing matters to his legal assistant when the ALJ directed him to pay attention.

9. We have reviewed the transcript cites given by Center, all of which involve discussion of an appeal of the ALJ's order denying Center's Motion to Disqualify. One example is an interjection from the ALJ agreeing with a statement from counsel. Tr. 268. Counsel then continued with his suggestion that the ALJ continue the status conference while he decided whether to appeal the ALJ's order. Counsel stated he had not seen a transcript of the Admissions Session and was concerned because of statements of other counsel in the *Register* about the Session. Apparently referring to the merits of Center's Motion to Disqualify

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> I'm going to have to set an admissions session and I will do that for the 25th of February. And what will transpire on that day is the parties will formally move the admissions of their exchanged sworn written testimony and any documents related to the issues in this case.
>
> Those will be received in evidence or there will be a ruling that they're not going to be received on evidentiary grounds or there may be a ruling even that they can't be ruled upon without the benefit of a sponsoring witness, in which case we will wait until the hearing to bring it in.
>
> But I suspect that -- my plans would be to get the bulk of the documentary evidence received into evidence on that day before the hearing.
>
> I also, at that time, rule on requests for cross examination, if there are contested requests for cross examination. That is where someone has noticed a witness for cross and the party opposes that request. I would take the opportunity to hear argument and to rule on those requests on the 25th.

Tr. 28. The procedure for handling testimony from public witnesses was less clear, however. *See* Tr. 52-53.

[11] *Cf. Communi-Centre Broadcasting, Inc. v. FCC*, 856 F.2d 1551 (D.C. Cir. 1988), where the court included prejudice suffered by the other parties and the burden on the administrative system as factors to be weighed when considering an applicant's dismissal for failing to meet prescribed deadlines.

[12] The Mass Media Bureau filed its Opposition to Disqualification on March 12, 1992, arguing that the ruling to which Center takes exception was a result of Center's own actions in failing to exchange sworn witness statements and appear at the Admissions Session, not of bias on the ALJ's part. The Bureau also questioned Center's intentions in filing numerous pleadings after the ALJ's February 28th *Order* and accused Center of distorting the facts about its attempt to participate by speaker phone, since Center had made no advance arrangements to do so as required by the Commission's Rules. In response, Center took exception to the Bureau's characterization of its intentions in filing the bias claim and argued that the ALJ's bias is shown by what it calls "systematic consistent adverse rulings that deny Center Due Process." Center for Study and Application of Black Economic Development's Response to Mass Media Bureau's Opposition to Disqualification of Presiding Judge, March 30, 1992, page 3.

upon which he had already ruled, the ALJ advised Center that the matter was "not one of the items that is on my agenda for today," and said he still wanted an answer about Center's intentions regarding an appeal of the disqualification order. He then invited Center's counsel to continue. Tr. 270. At another point the ALJ was confused about which appeal Center was referring to when counsel suggested an appeal had been filed early to protect the record, and he interrupted Center's counsel for clarification. Tr. 290. During a discussion of the logistics of cancelling the hearing pending a ruling on Center's appeal of the disqualification order, the ALJ invited additional questions. When Center's counsel said he had a question "On the issue --," the ALJ interrupted to be certain the question pertained to logistics. Center's counsel was allowed to continue with his question. Tr. 300-301. At the end of the status conference, the ALJ was offering the assistance of his office with certain caveats. He directed Center's counsel to pay attention to what he was saying, Tr. 308, apparently because counsel and his assistant were pointing out documents to each other while the ALJ was speaking. The colloquies on which Center relies are nothing more than the ALJ's attempt to keep the status conference focused on the business at hand and to ensure that there are no misunderstandings on his part or Center's. Although Center complains that counsel was unable to make his points, the transcript shows the contrary. Center was allowed and sometimes invited to continue his points. The ALJ has broad discretion to direct the course of the proceedings before him, and his efforts to keep the proceeding focused do not support Center's charge that the ALJ is biased.[13]

10. In its second Amended Second Motion to Disqualify Presiding Judge, filed April 22, 1992, and based on the transcript of the February 25 Admissions Session, Center pointed to comments made and topics discussed during the Session that it alleged were not included in the ALJ's *Order*. These included discussion by the ALJ and the participating parties about Center's failure to follow procedural rules, such as meeting timeliness requirements, the consequences that will flow from Center's defaults, how to proceed with the hearing, and the nature of Center's participation in the hearing in light of its problems. These also included discussion of the role of public witnesses in light of the restrictions the ALJ planned to impose on Center's renewal expectancy showing. Center also pointed to the ALJ's statement on the record about Center's effort to participate via speakerphone.

11. Center's argument here appears to be twofold. Center is complaining that the ALJ's *February 28 Order*, issued after the Admissions Session, did not reflect all of the conversation at the Session, including conversation about how to proceed in light of Center's absence and the consequences that could flow to Center for failing to appear. But, Center has cited to no requirement for so inclusive an order, and we know of none.[14] The order contained all the ALJ's procedural rulings and recited the factors the ALJ considered in making his decision, including Center's arguments in its responsive pleading to Iowa Acorn's written motion on which the ALJ acted. Center also appears to be complaining that the ALJ and the other parties engaged in discussions about how to proceed in light of Center's failure to submit written testimony or appear at the Admissions Session. But, again, Center has cited no authority in support of its position. Center had notice of the Admissions Session and was expected to participate. The discussion at the Session--the admission of evidence from all the parties including Center--did not become improper because it included discussion of how to proceed with admitting and presenting evidence in light of Center's failure to provide written testimony or appear.[15] Nor does the fact that the ALJ heard the other parties' views about how to proceed in light of Center's defaults suggest that his rulings were based on any considerations other than what had gone on in the proceeding before him. Rulings based on what the ALJ has learned from his participation in the case do not support a finding of personal bias or prejudice that would disqualify the presiding officer. *See Grinnell Corp.*, 384 U.S. at 583.

INTERLOCUTORY APPEAL OF RULINGS

12. The Board's finding that the Presiding Officer should not be disqualified for bias is not a ruling on the merits of his *February 28 Order*. In analyzing the bias issue, we have considered only whether the information presented to the Board suggests that the ALJ's rulings were based on what he had learned in the course of the proceeding or some influence outside the record. We have not considered whether the ALJ's rulings were erroneous. In its Interlocutory Appeal to the Review Board, Center has asked both for such a ruling because of the nearness of the hearing date and for a hearing before the Board.[16] We are denying this request as premature.

13. Under 47 C.F.R. § 1.301(b), which governs appeals from interlocutory rulings of presiding officers, Center may not appeal the ALJ's rulings unless allowed to do so

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[13] We are confining our review of the Admissions Session and status conference to the transcripts of those sessions and are not listening to tapes as requested by Center. The transcripts are the official records of those sessions. Any tapes that were made were made by the stenographer to help in preparing the transcript. We do not consider a subjective evaluation of the ALJ's tone of voice appropriate to our evaluation of extrajudicial sources of bias, the appropriate standard here.

[14] Center has asserted its inability to afford transcripts, Tr. 269, and has an outstanding request to proceed *in forma pauperis*. This should be acted on by the ALJ when he again assumes jurisdiction as a result of the Board's order. *See* 47 C.F.R. § 1.243(l).

[15] The ALJ did say during the Admissions Session that he might issue an order to show cause as to why Center should not be dismissed for failing to appear, but he did not do so. We find no extrajudicial bias in his articulating one of the options for testing the sincerity of an applicant who, at the time of the Admissions Session, did not appear to be actively prosecuting its application. *See generally, Communi-Centre v. FCC*, 856 F.2d at 1554; (D.C. Cir. 1988); *Hillebrand Broadcasting, Inc.*, 1 FCC Rcd at 419 ¶ 3.

[16] According to Center's Proof of Service, this was mailed to counsel for the other parties on March 11, 1992. It was filed with the Commission on March 16, 1992. The Mass Media Bureau commented that the hearing was scheduled for March 10 but had been cancelled by the ALJ during the March 5 status conference because of Center's appeal of the disqualification question. Mass Media Bureau Comments on Interlocutory Appeal, March 19, 1992. Because Center knew this when filing, the Bureau asked that Center be admonished for filing a frivolous pleading.

by the ALJ.[17] Although Center has asked the ALJ to reconsider his rulings,[18] Center has not asked him to allow an appeal.[19] This is not an instance where form overcomes substance for Center can later seek review of the ALJ's rulings by taking exception to these rulings in any exceptions it files to the ALJ's initial decision. 47 C.F.R. § 1.302(b)(1). *See* 47 C.F.R. §§ 1.276(a), 1.277(a). If it does, it must show how alleged errors in the rulings are material, and it must clearly present the points of fact and law relied on to support its position that the rulings are erroneous. Merely asserting error because the rulings are adverse will not suffice.[20]

14. ACCORDINGLY, IT IS ORDERED That Center for Study and Application of Black Economic Development's Interlocutory Appeal to the Review Board of the Denial on Center's Motion to Disqualify Presiding Judge filed March 5, 1992, Second Motion to Disqualify Presiding Judge filed March 12, 1992, Amended Second Motion to Disqualify Presiding Judge filed March 30, 1992, and Amended Second Motion to Disqualify Presiding Judge filed April 22, 1992, ARE DENIED.[21]

15. IT IS FURTHER ORDERED That Center for Study and Application of Black Economic Development's Interlocutory Appeal to Review Board filed March 16, 1992, IS DISMISSED.

16. IT IS FURTHER ORDERED That Center for Study and Application of Black Economic Development's Application for Review under 47 CFR §1.115 IS DISMISSED as premature.[22]

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

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[17] Only rulings denying or terminating the rights of a person to participate as a party, requiring testimony or document production over an objection based on a claim of privilege, denying a motion to disqualify the presiding officer, granting settlement agreements without terminating the proceeding, or removing counsel may be appealed as a matter of right under 47 C.F.R. § 1.301(a). None of those provisions is applicable here.

[18] The ALJ denied Center's request for reconsideration for several reasons. First, the ALJ may not entertain requests for reconsideration of interlocutory rulings under 47 C.F.R. §§ 1.102(b)(2) and 1.106(a)(1). *Reconsideration Order* at ¶ 2. In addition, Center has not stated sufficient reasons for reconsideration. *Id.* at ¶ 3. The ALJ explained that, although he found Center in default for failing to attend the Admissions Session, he based his ruling precluding witnesses on Center's failure to exchange written testimony as required by the ALJ's *Prehearing Order*. *Id.* at ¶ 4. He further explained that holding conferences by speakerphone must be arranged in advance because the courtrooms do not have permanent telephone connections, and that an admission session is the commencement of the receipt of evidence, not just a prehearing conference. *Id.* ¶¶ 5-6. Under 47 C.F.R. § 1.248(f), a presiding officer may approve a written request to use a speakerphone at a prehearing conference if such use will "conduce to the proper dispatch of business and the ends of justice." But, the advance consent of the other parties is required for taking testimony by speakerphone. 47 C.F.R. § 1.364(a). According to the ALJ, Center had no basis to assert it was denied a right to participate by speakerphone, and it had no reasonable expectation of participating by speakerphone when counsel tried to call the ALJ during the Admissions Session. *Reconsideration Order* at ¶ 6. The ALJ further said that Center had not shown any cause for failing to exchange written testimony. *Id.* at ¶ 10. In its Application for Review, Center claims that this discussion on the merits after asserting a lack of jurisdiction is a further indication of the ALJ's bias. We disagree. Such discussions of the merits are common in the event the procedural ruling is reversed.

[19] A request for permission to appeal must be made within five days after the release of the order and must "contain a showing that the appeal presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception" 47 C.F.R. ¶ 1.301(b). Center has not tendered this showing to the ALJ. Even if we were to construe Center's request for reconsideration a request for permission to appeal, we would have to construe the ALJ's denial as a denial of permission. Under 47 C.F.R. § 1.301(b), this would be final.

[20] As noted above, the ALJ has broad discretion to "[r]egulate the course of the proceeding." 47 C.F.R. § 1.243(f). *But see* 47 C.F.R. § 1.248(d). Parties to broadcast proceedings must be prepared to discuss reducing their affirmative direct cases to writing at the prehearing conference, and they are encouraged to do so by Commission policy. However, in hearings that do *not* involve "applications for new, improved and changed facilities and in comparative hearings involving only applications for new facilities," the extent to which direct affirmative cases are to be provided in written form "is to be left to agreement of the parties as approved by the presiding officer." Section 1.248(d)(3). The nature of any agreement among the parties in this case is not before the Board, and we have not been briefed on how this provision might affect the ALJ's authority in this proceeding, particularly in light of the parties' reliance on the exchange of written cases rather than deposition testimony for their hearing preparation.

[21] Prepublication copies are being sent to the parties and the ALJ, with copies to counsel.

[22] Center applied for Commission review under 47 C.F.R. § 1.115, which provides for review of actions taken pursuant to delegated authority. This application is premature because the matters addressed were pending before the Board when it was filed. Consistent with the actions taken here on the disqualification issues and the interlocutory review of the ALJ's rulings, the Board has considered arguments in the application going to the ALJ's disqualification but not those going to the substance of the ALJ's *February 28 Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-31

In the Matter of

Amendment of Section 73.202(b), RM-7908
Table of Allotments,
FM Broadcast Stations.
(East Ridge, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 7, 1992; Released: May 19, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Sattler Broadcasting, Inc. ("petitioner"), licensee of Station WJRX-FM, Channel 300A, East Ridge, Tennessee, the Commission has before it the *Notice of Proposed Rule Making*, 7 FCC Rcd 1722 (1992), proposing the substitution of Channel 300C3 for Channel 300A at East Ridge, Tennessee, and modification of Station WJRX-FM's license to specify operation on the higher powered channel. Petitioner filed comments stating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 300C3 for Channel 300A at East Ridge, since it would provide the community with a wide coverage area FM service. Channel 300C3 can be allotted to East Ridge in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.8 kilometers (13.6 miles) northwest to accommodate petitioner's desire site.[1] As proposed, we will also modify petitioner's license for Station WJRX-FM to specify operation on Channel 300C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
East Ridge, Tennessee	300C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sattler Broadcasting, Inc. for Station WJRX-FM, East Ridge, Tennessee, IS MODIFIED to specify operation on Channel 300C3, in lieu of Channel 300A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Sattler Broadcasting, Inc., licensee of Station WJRX-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 300C3 at East Ridge are North Latitude 35-06-31 and West Longitude 85-24-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-108

In the Matter of

Amendment of Section 73.202(b), RM-7970
Table of Allotments,
FM Broadcast Stations.
(St. Joseph, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 8, 1992; **Released: May 19, 1992**

Comment Date: July 13, 1992
Reply Comment Date: July 28, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by St. Joseph Broadcasters ("petitioner") requesting the allotment of FM Channel 225C3 to St. Joseph, Minnesota, as that community's first local broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration. Channel 225C3 can be allotted to St. Joseph, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 7.3 kilometers (4.5 miles) northwest of the community.[1] The site restriction will prevent a short spacing with Station KLZZ, Channel 279A, Waite Park, Minnesota.[2]

3. In view of the fact that the proposed allotment would provide a first local broadcast service to St. Joseph, Minnesota, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
St. Joseph, Minnesota	---	225C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 13, 1992,** and reply comments on or before **July 28, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gregg Skall
Louise Cybulski
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] The coordinates for Channel 225C3 at St. Joseph are 45-37-14 and 94-22-05.

[2] The construction permit for Station KLZZ, Waite Park, Minnesota, was modified to specify operation on Channel 279C3 in MM Docket No. 89-377. *See* 5 FCC Rcd 3520 (1990). Once Station KLZZ is licensed on Channel 279C3, the short spacing to Channel 225C3 will be removed and it would no longer be necessary to site restrict the channel at St. Joseph.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-112

In the Matter of

Amendment of Section 73.202(b), RM-7982
Table of Allotments,
FM Broadcast Stations.
(Hawkinsville, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 8, 1992; Released: May 19, 1992

Comment Date: July 13, 1992
Reply Comment Date: July 28, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Tri-County Broadcasting Co. ("petitioner"), licensee of Station WCEH(FM), Channel 280A, Hawkinsville, Georgia, requesting the substitution of Channel 280C3 for Channel 280A at Hawkinsville and modification of its license for Station WCEH(FM) to specify operation on the higher powered channel.

2. We believe the public interest would be served by proposing the substitution of Channel 280C3 for Channel 280A at Hawkinsville, Georgia, since it could provide the community with a wide coverage area FM service. Channel 280C3 can be allotted to Hawkinsville in compliance with the Commission's minimum distance separation requirements with a site restriction 20.9 kilometers (13 miles) southwest to accommodate petitioner's desired site.[1] Channel 280C3 is short-spaced to Station WEGC(FM), Channel 279A, Leesburg, Georgia, and Station WXRS(FM), Channel 280A, Swainsboro, Georgia. However, Station WEGC(FM) was ordered to Channel 278C3 in MM Docket No. 91-336 and Station WXRS(FM) was ordered to Channel 263A in MM Docket No. 89-418. *See* 7 FCC Rcd 1972 (1992) and 6 FCC Rcd 5793 (1991), respectively. Therefore, final authorization of Station WCEH(FM) at Hawkinsville may be delayed until Station WEGC(FM) is licensed on Channel 278C3 and Station WXRS(FM) is licensed on Channel 263A. We will serve the licensees of Station WEGC(FM) and Station WXRS(FM) with a copy of this *Notice of Proposed Rule Making*. As requested, we shall also propose to modify petitioner's license for Station WCEH(FM) to specify operation on Channel 280C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 280C3 at Hawkinsville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Hawkinsville, Georgia	280A	280C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by Certified Mail, Receipt Requested to:

Lacom Communications, Inc.
P.O. Box 1590
Swainsboro, Georgia 30401
(Licensee of Station WXRS(FM))

Rowland Albany Radio, Inc.
235 Roosevelt Avenue, #501
Albany, Georgia 31701
(Licensee of Station WEGC(FM))

6. Interested parties may file comments on or before **July 13, 1992,** and reply comments on or before **July 28, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Dan J. Alpert
Ginsburg, Feldman & Bress, Chartered
1250 Connecticut Avenue, N.W., Suite 800
Washington, D.C. 20036
(Counsel for Tri-County Broadcasting Co.)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from

[1] The coordinates for Channel 280C3 at Hawkinsville are North Latitude 32-10-32 and West Longitude 83-39-11.

the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-113

In the Matter of

Amendment of Section 73.202(b), RM-7983
Table of Allotments,
FM Broadcast Stations.
(Huntsville, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 8, 1992; Released: May 19, 1992

Comment Date: July 13, 1992
Reply Comment Date: July 28, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by New Wavo Communication Group, Inc. ("petitioner"), permittee of Station KVST-FM, Channel 278A, Huntsville, Texas, requesting the substitution of Channel 279C3 for Channel 278A at Huntsville and modification of its construction permit for Station KVST-FM to specify operation on the higher powered channel.

2. We believe the public interest would be served by proposing the substitution of Channel 279C3 for Channel 278A at Huntsville, Texas, since it could provide the community with a wide coverage area FM service. Channel 279C3 can be allotted to Huntsville in compliance with the Commission's minimum distance separation requirements with a site restriction of 2.4 kilometers (1.5 miles) east to accommodate petitioner's desired site.[1] As requested, we also propose to modify petitioner's authorization for Station KVST-FM to specify operation on Channel 279C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Huntsville or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huntsville, Texas	259A, 269A 278A	259A, 269A, 279C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **July 13, 1992,** and reply comments on or before **July 28, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Patricia A. Mahoney, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 279C3 at Huntsville are North Latitude 30-43-24 and West Longitude 95-31-30.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-20

In the Matter of

Amendment of Section 73.202(b), RM-7645
Table of Allotments,
FM Broadcast Stations.
(Shingle Springs and Quincy,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 12, 1992; Released: May 19, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 7 FCC Rcd 1327 (1992), issued in response to a petition filed on behalf of Lobster Communications Corporation ("Lobster") proposing the substitution of Channel 270B for Channel 270B1 at Shingle Springs, California, and modification of the license for Station KFIA-FM,[1] to specify operation on the higher class channel. Additionally, in order to accommodate the modification request, Lobster also requested the substitution of Channel 271A for Channel 271C2 at Quincy, California, and modification of the license issued to Olympic Broadcasters, Inc. ("Olympic"),[2] for Station KQNC(FM), accordingly. Olympic filed supporting comments stating its intention to apply for both Channel 270B if allotted to Shingle Springs, and Channel 271A if allotted to Quincy. No other comments were received.

2. We believe the public interest would be served by substituting Channel 270B for Channel 270B1 at Shingle Springs, and substituting Channel 271A for Channel 271C2 at Quincy, California, since it would enable Station KFIA-FM to provide an enhanced service within its coverage area. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license for Station KFIA-FM to specify operation on Channel 270B at Shingle Springs, as requested.

3. As indicated in the *Notice*, Channel 270B can be substituted for Channel 270B1 at Shingle Springs at the petitioner's suggested site, located 25.3 kilometers (15.7 miles) north of the community.[3] Channel 271A can be substituted for Channel 271C2 at Quincy at the site specified in the construction permit issued to Station KQNC(FM).[4]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Shingle Springs, California	270B
Quincy, California	240A,[5] 262A,[6] 271A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Olympic Broadcasters, Inc. for Station KFIA-FM, IS MODIFIED to specify operation on Channel 270B in lieu of Channel 270B1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Olympic Broadcasters, Inc. for Station KQNC(FM), IS MODIFIED to specify operation on Channel 271A in lieu of Channel 271C2, subject to the following conditions:

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[1] Effective September 1, 1991, the call letters of Station KLIQ(FM) were changed to KFIA-FM.

[2] Olympic is the successor in interest to Lobster. A voluntary assignment of the license from Lobster to Olympic was granted April 1, 1991 (File No. BALH-910130GY), and consummated April 9, 1991.

[3] Coordinates used for Channel 270B at Shingle Springs are 38-53-31 and 120-57-53.

[4] Coordinates specified in the construction permit issued to Station KQNC(FM) at Quincy are 40-03-36 and 120-54-46. As stated in the *Notice*, the distance between the Shingle Springs proposal and Station KQNC(FM) at Quincy is 129.7 kilometers, whereas a separation of 241 kilometers is required in this instance. The mutual exclusivity between the two allotments would not have occurred if Olympic had applied to modify its construction permit to specify a Class A channel prior to the filing of its proposal, since the required separation between first adjacent Class A and B channels is 113 kilometers. As the downgrading is necessary to meet the spacing requirements at Shingle Springs, and in the interest of expediting its desire to provide improved service to that community, Olympic chose to seek the modification of its license for Station KQNC(FM) in the context of the same proceeding.

[5] Channel 240A was substituted for Channel 276A at Quincy in MM Docket No. 89-402. *See* 7 FCC Rcd 1318 (1992).

[6] A proposal to substitute Channel 262C3 for Channel 262A at Quincy is pending in MM Docket No. 92-55. *See* 7 FCC Rcd 2097 (1992).

(a) Nothing contained herein shall be construed as authorizing any change in Station KQNC(FM)'s license, BLH-840710CS, except the channel as specified above. Any other changes, except those so specified under Section 73.1620 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license BLH-840710CS, except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

7. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Olympic Broadcasters, Inc., licensee of Station KFIA-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade at Shingle Springs, California.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 90.267 of the Commission's Rules and Regulations to Require Licensing of 450 MHz 12.5 kHz Offset Channel Stations as Base, Fixed or Mobile Relay Stations — RM-7748

ORDER

Adopted: May 13, 1992; Released: May 19, 1992

By the Chief, Private Radio Bureau.

1. On June 6, 1991 the National Association of Business and Educational Radio, Inc. (NABER) petitioned to amend Section 90.267 of the Commission's Rules, 47 C.F.R. § 90.267, to (1) require stations in the Business Radio Service utilizing the 450 MHz offset frequencies to be licensed as base, fixed, mobile or mobile relay stations, as appropriate; (2) increase the 2-watt transmitter power limitation for the offset frequencies to 25 watts effective radiated power (ERP); and (3) reserve five offset frequency pairs for itinerant use only.[1] Eight comments were filed in response to the Petition.[2]

2. On November 26, 1986 NABER filed a similar petition concerning offset frequency licensing. That petition was dismissed by the Chief, Private Radio Bureau.[3] The instant petition appears indistinguishable from the previous one, offering similar proposals and providing no new information or arguments in support of the proposals. Under Section 1.401(e) of the Rules, 47 C.F.R. § 1.401(e), such repetitive petitions may be dismissed without prejudice.

3. With regard to the merits of the petition, NABER and some commenters claim that the frequency data base must reflect the specific use and coordinates of an offset frequency station to improve coordination and minimize interference. NABER supports this contention by describing a particular scenario wherein interference *might* occur due to a coordinator not having specific station coordinates. Experience, however, has shown that instances of such interference have been minimal.

4. The offset frequencies were made available for secondary use to enable low-power, short-range communications. They have become extensively used because of their operational flexibility that, for example, now enables licensees to reconfigure systems as necessary without the need for costly license modification. We conclude that the loss of such flexibility would outweigh any potential benefits that might be obtained by requiring the offset frequencies to be licensed for specific uses or at specific locations.[4]

5. Accordingly, pursuant to Section 0.331, 1.401 and 1.407 of the Commission's Rules, 47 C.F.R. §§ 0.331, 1.401 and 1.407, IT IS ORDERED that the petition filed by the National Association of Business and Educational Radio, Inc. RM-7748, IS DISMISSED.

6. For further information, contact Eugene Thomson, Rules Branch, Private Radio Bureau, (202) 634-2443.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

[1] *See*, RM-7748, appearing on Public Notice June 24, 1991.

[2] Supporting comments were received from the Associated Public-Safety Communications Officers, Inc., the American Automobile Association, Forest Industries Telecommunications, Hewlett Packard Medical Products Group, and the American Private Radio Association, Inc. Opposing comments were filed by the American Petroleum Institute, and the Utilities Telecommunications Council.

[3] *See*, Order, RM-5962, 2 FCC Rcd 6024, (1987).

[4] Additionally, the issue of modifying our rules regarding the 450-470 MHz offset frequencies was raised in our recent proceeding exploring spectrum efficiency in the private land mobile radio bands. We do not believe that it would be appropriate to proceed at this time with any rule changes that could be modified as a result of a possible future Commission action related to this new proceeding. *See*, Notice of Inquiry, PR Docket No. 91-170, 6 FCC Rcd 4126 (1991), para. 64.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

OGDEN TELEVISION, INC. File No. BPCT-890523KG

For Modification of License of Station KOOG-TV, Ogden, Utah

ROYAL TELEVISION OF UTAH, INC. File No. BMPCT-890519KG
File No. BMPCT-910228KF

For Modification of Construction Permit for Station KZAR-TV, Provo, Utah

and

For Extension of Construction Permit for Station KZAR-TV, Provo, Utah File No. BMPCT-881221KE

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1992; Released: May 19, 1992

By the Chief, Video Services Division:

1. By separate letters dated May 8, 1990, the Chief, Video Services Division, waived Section 73.610 of the Commission's Rules and granted the above-captioned application of Ogden Television, Inc. (OTI) for modification of license of Station KOOG-TV, Channel 30, Ogden, Utah, and the application (BMPCT-890519KG) of Royal Television of Utah, Inc. (Royal) for modification of the construction permit of unbuilt Station KZAR-TV, Channel 16, Provo, Utah. The staff also granted Royal's above-captioned application for an extension of time to construct Station KZAR-TV. We now have before us for consideration the June 15, 1990, petition for reconsideration of those actions, filed by American Television of Utah, Inc. (American), licensee of Station KXIV(TV), Salt Lake City, Utah. Subsequent to the filing of the petition for reconsideration, Royal filed a further application for modification of Station KZAR-TV's construction permit (BMPCT-910228KF), which has been opposed by the Association for Maximum Service Telecasters, Inc. (AMST). Both the subsequent modification application and the objection are also before us for consideration.

BACKGROUND

2. On May 19, 1989, Royal filed a modification application claiming that, from its authorized site which met all spacing requirements, it could not provide line-of-sight to Salt Lake City, the largest community in its predicted principal community contour. Consequently, Royal argued that a change of transmitter site was necessary. The proposed site would have been 11.8 kilometers (7.3 miles) short of the required 280.8-kilometer (174.5-mile) separation to the reference point for a co-channel station in Cedar City, Utah, and 5.7 kilometers (3.5 miles) short of the required 87.7-kilometer (54.5-mile) separation to the reference point for Channel 15 in Price, Utah. Accordingly, Royal requested waiver of Section 73.610.[1] On May 23, 1989, in an effort to more than triple the population in its Grade B service area, OTI proposed a new site that would be 2.9 kilometers (1.8 miles) short of the required 31.4-kilometer (19.5-mile) separation to the reference point for Channel 26 in Salt Lake City. OTI's proposed site was also short-spaced to Royal's then-authorized site but would be fully spaced with respect to its then-proposed site. OTI also sought waiver of Section 73.610.

3. In approving the applications, the staff first found that all of the short-spacings proposed in both applications involved vacant allotments, rather than existing stations, and that several potential sites for future applicants on those channels had been demonstrated. With respect to Royal's application, the staff also noted that the permittee's then-authorized site would not provide line-of-sight service to Salt Lake City, the largest city in its principal community contour, and that the proposed site would rectify that deficiency. Moreover, the staff found that operation of Station KZAR-TV from its proposed site would provide a first off-the-air television service to areas south of Provo. As to OTI's application, the staff noted that it involved only a minor short-spacing and that grant of the application would result in a Grade B gain area encompassing 305,000 persons with a corresponding loss area of only 9,654 persons. Further, the staff stated that the loss area was amply served by other television stations, television translators, and cable television systems. Accordingly, Section 73.610 of the Rules was waived with respect to both applicants and the applications were granted. American's petition for reconsideration followed on June 15, 1990.

4. After our grant of Royal's initial modification request, the permittee conducted extensive negotiations with the landowner for its new site. When those negotiations proved futile, Royal found it necessary to file a further modification application to propose a new transmitter site approximately two miles west of Mona, Utah. That site is adequately spaced to the Channel 15 vacant allotment at Price, Utah, thereby eliminating a short-spacing created by the previous modification application. At the same time, however, the proposal would increase the short-spacing to the Channel 16 vacant allotment at Cedar City, Utah, from 11.8 kilometers (7.3 miles) to 22.7 kilometers (14.1 miles). Accordingly, Royal requests waiver of Section 73.610 of the Rules. In support of its waiver request, Royal states that the site would provide unobstructed coverage to Provo

[1] AMST filed a statement in connection with this waiver request, indicating that it would not oppose Royal's earlier modification application so long as any future stations authorized in Price and Cedar City would meet the Commission's spacing requirements.

and a first off-the-air signal to areas south of Nephi, Utah. It further notes that 46 other channels could be substituted for Channel 16 in Cedar City. AMST opposes Royal's new proposal on the grounds that the permittee has failed to demonstrate whether there is still sufficient land available for potential applicants for the Channel 16 allotment to locate at a fully spaced site.

PROCEDURAL MATTERS

5. The Commission's Rules provide two stages at which interested parties can object to the grant of minor modification or extension applications. Prior to initial action on an application, an informal objection can be filed pursuant to Section 73.3587 of the Rules; however, American failed to object to any of Royal's or OTI's applications at that stage. Post-grant petitions for reconsideration of Commission actions are controlled by Section 405 of the Communications Act and Section 1.106 of the Commission's Rules. Section 1.106(b)(1) provides that an entity that is not a party to a proceeding may nevertheless file a petition for reconsideration of a Commission action if it states with particularity the manner in which its interests are adversely affected by the action taken and shows good reason why it was not possible to participate earlier in the proceeding. In adopting portions of Section 405, Congress recognized that the public interest, convenience, and necessity has procedural as well as substantive elements and that orderliness, expedition, and finality are important matters to consider in determining whether reconsideration is warranted. *See, Valley Telecasting Co. v. F.C.C.*, 336 F.2d 914 (D.C. Cir. 1964); *Parkell Broadcasting, Inc.*, 59 F.C.C. 2d 811, *aff'd sub nom., Southwest Broadcasting Company v. F.C.C.*, 559 F.2d 188 (D.C. Cir. 1977 (per curiam). Thus, in the pursuance of these interests, our Rules require that satisfactory reasons be provided as to why it was not possible for a party seeking reconsideration to have utilized the pre-grant objection procedure.

6. Because American competes for audience and revenues with OTI and because OTI's application is "inextricably intertwined" with Royal's, American contends that its economic interests have been adversely affected by the grant of the applications. American further maintains that it did not participate earlier in the proceeding because certain facts only recently came to its attention. In opposition, both OTI and Royal argue that American failed to demonstrate "good reason" for not participating earlier. They note that American had constructive notice of the filing of both modification applications nearly a year before action was taken. OTI adds that "it is ludicrous to assume that a television licensee in a market would not keep track of activities in and around the market" and concludes that American's petition for reconsideration was filed solely for the purpose of delay. If a petition relies on new facts, Section 1.106(c) of the Rules requires the petitioner either to show how the facts changed since the last opportunity to present the matters or to demonstrate that the facts could not have been ascertained, through the exercise of ordinary diligence, prior to that time. OTI maintains -- and we agree -- that American has failed to meet either of these requirements. Although American argues that Royal's and OTI's waiver requests should not have been granted, it does not allege any facts which it could not have ascertained prior to the grant, nor has it demonstrated changed circumstances. Moreover, it raises no public interest reasons which would warrant reversal of our previous actions. The Court has observed that an appellant cannot "sit back and hope that a decision will be in its favor and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such procedure were allowed." *Colorado Radio Corporation v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941). Accordingly, we will dismiss American's petition for reconsideration. There is, therefore, no need to give further consideration to OTI's application. Royal, however, proposes a new site that we have not ruled upon, and we turn to that application now.

DISCUSSION

7. The Television Table of Allotments was established so that stations in a given community could operate with maximum power and antenna height without creating objectionable interference to neighboring stations. To maintain the integrity of the Table, it was necessary to establish minimum mileage separations and to allow only limited deviations from those separations. Those spacing requirements presumptively serve the public interest, and applicants seeking waivers to operate from short-spaced sites are required to demonstrate that the public interest will be better served by a waiver in the circumstances presented than by following the terms of the rule. First, however, the applicant must make a threshold showing that suitable fully spaced sites or less short-spaced sites are unavailable. *Townsend Broadcasting Corporation*, 62 F.C.C. 2d 511, 512 (1976); *Edens Broadcasting, Inc.*, 2 FCC Rcd. 689, 693 (Rev. Bd. 1987). Upon meeting that threshold showing, we then review several public interest factors to determine whether grant of the waiver is warranted: (1) the unsuitability of the existing site, either in terms of the economic viability of the station, in technical terms, or in a licensee's inability to reach areas containing a significant number of viewers who lack service, a network service, or "independent" service; (2) the magnitude of the short-spacing; (3) the nature and extent of any predicted loss of service that would result from a grant of the short-spacing; (4) the aeronautical and environmental benefits and drawbacks of locating a tower in a particular area; (5) the concerns, if any, expressed by the licensee(s) to which short-spacing would result; (6) the extent to which the licensee obtained its license knowing there were spacing restraints imposed in a rule making proceeding; and (7) whatever technical proposal an applicant might make to reduce or eliminate objectionable interference. *See, Caloosa Television Corporation*, 3 FCC Rcd. 3656 (1988), *recon. denied*, 4 FCC Rcd. 4762 (1989).

8. While Royal did attempt to negotiate with the land owner of the authorized site, they could not reach an agreement on Royal's use of the land, and we recognize the necessity of finding a new site. Nevertheless, Royal has made no attempt to demonstrate the unavailability of fully spaced sites or those that would be less short-spaced than the one proposed. Further, the magnitude of the short-spacing, while moderate in the previous modification application, would be nearly doubled here (14.1 miles) and would severely restrict the ability of a future applicant for Channel 16 in Cedar City from finding a site that would meet all Commission requirements. While Royal does allege that it would be theoretically possible to operate a future station in Cedar City on Channel 16 or on any of 46 other channels consistent with the Commission's spac-

ing requirements, there has been no attempt to show whether any sites are available or whether their use would be consistent with all Commission Rules, including the ability to provide line-of-sight coverage of Cedar City. We further note that Royal's technical proposals have shown a steady decline over the years in terms of the population within its predicted Grade B service area. Prior to May 1990, Royal had a predicted Grade B service area encompassing more than 1,150,000 persons, although rough terrain would have prevented a large number of those persons from receiving a viewable signal. Royal's authorized predicted Grade B service area encompasses 911,000 persons, and it now proposes to reduce that to 242,000. Moreover, the grant of the proposed modification would result in no Grade B gain areas, and large areas to the southeast and southwest of Nephi, Utah, would be left with no off-the-air television signals. We therefore cannot find any public interest considerations which would warrant waiver of our minimum spacing requirements, and Royal's modification application will be denied.

9. Accordingly, for the reasons set out above, American's petition for reconsideration of the staff's May 8, 1990, actions granting OTI's modification application (BPCT-890523KG) and Royal's modification and extension applications (BMPCT-890519KG and BMPCT-881221KE) IS DISMISSED; AMST's informal objection IS GRANTED; Royal's request for waiver of Section 73.610 of the Rules IS DENIED; and Royal's modification application (BMPCT-910228KF) IS DISMISSED.[2]

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Services Division
Mass Media Bureau

[2] On July 9, 1990, during the pendency of American's petition for reconsideration, Royal sought a further extension of time to construct the station (BMPCT-900709KE). In view of our action herein, we will separately grant that application for extension of time to construct.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

COMMUNICATIONS SATELLITE CORPORATION — File No. I-T-C-92-076

For authority pursuant to Section 504(c)(3) of the International Maritime Satellite Telecommunications Act of 1978 and Section 214 of the Communications Act of 1934, as amended, to establish and operate channels of communications for use in the provision of a point-to-multipoint data communications service via the Inmarsat system

MEMORANDUM, OPINION, ORDER AND AUTHORIZATION

Adopted: May 12, 1992; Released: May 19, 1992

By the Chief, International Facilities Division:

1. On January 6, 1992, the Communications Satellite Corporation (Comsat), through its Comsat Mobile Communications Division, filed the above-captioned application requesting authority pursuant to Section 504(c)(3) the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c)(3), and Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, to establish and operate channels of communications for use in provision of a simplex point-to-multipoint data service in the shore-to-ship direction via the Inmarsat system. The application was placed on public notice on January 15, 1992. No petitions or comments were received. For the reasons set forth below, we grant the application.

2. Comsat states that the Inmarsat Council has approved technical standards to allow Inmarsat signatories to provide this point-to-multipoint data service as a standard offering. Comsat seeks authority to provide the proposed service as a full-period, 4.8 kHz bandwidth, point-to-multipoint broadcast data service. The transmissions will be 1200, 2400, or 4800 symbol per second (600, 1200, or 2400 Bps) (at the customer's option) constant envelope rectangular BPSK modulated carrier with an approximate EIRP of 48.6 dBW at the ground earth station (GES) (6.6 dBW spacecraft EIRP), within the frequencies the Commission has authorized for Inmarsat maritime satellite services. It will be provided in the Atlantic Ocean Region-East and Atlantic Ocean Region-West through Comsat's GES in Southbury, Connecticut (WA-28); in the Pacific Ocean Region through its GES in Santa Paula, California (KA-31); and in the Indian Ocean Region through its new GES in Anatolia, Turkiye. Pursuant to temporary authority, Comsat has already acquired and installed a BPSK modulator and a minor amount of additional equipment at the Southbury and Santa Paula GESs and will install similar equipment at the Turkish facility.[1] Total earth station equipment costs to provide the service are expected to amount to less than $10,000 per GES.[2] Use of the GESs will be obtained from Comsat General Corporation pursuant to agreement. Transmissions will reach Comsat's GESs via the interconnected, authorized facilities of U.S. service carriers. Space segment will be obtained from Inmarsat pursuant to its Operating Agreement and regulations.

3. Comsat states that its point-to-multipoint service will enable information service providers to provide a wide variety of news and information services on a subscription or other paid basis to maritime customers over broad oceanic areas in a manner that is not now possible through Comsat. For example, point-to-multipoint channels can be used to transmit differential error-correction information that can enable users of positioning services to determine their positions with substantially greater accuracy. Comsat states that there is substantial demand for such a service as an aid to government ocean-mapping and seismic-survey projects, commercial cable laying and cable repair operations, and other governmental and commercial operations requiring high accuracy positioning at sea. Comsat concludes that authorization of this proposed service will contribute directly to the safety of life and property on the high seas and will promote the larger and more effective use of radio in the public interest. It will also allow Comsat to compete effectively with foreign Inmarsat signatories that provide this service. Comsat states that its tariffed rates for this service will be compensatory and the revenues will increase the base over which Comsat's fixed costs are spread, to the benefit of ratepayers.

4. We conclude that it will be in the public interest to allow Comsat to establish and operate the channels of communications requested in the instant application. This authorization will allow Comsat to provide a wide variety of services to maritime customers over broad oceanic areas in a manner that is not now possible through Comsat and for which there is substantial demand from governmental and commercial users. Moreover, this service will contribute directly to the safety of life and property on the high seas. Finally, we believe that U.S. policy should be designed to ensure timely and effective U.S. entry into the markets for new services. We conclude that this goal will be furthered by grant of Comsat's request.

5. Accordingly, pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Section 504(c)(3) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. § 753(c)(3), IT IS ORDERED that the application of the Communications Satellite Corporation, File No. I-T-C-92-076, IS GRANTED and Comsat is authorized to establish and operate channels of communications for use in provision of a full-period 4.8 kHz bandwidth, simplex point-to-multipoint broadcast data service in the shore-to-ship direction via the Inmarsat system in the Atlantic Ocean Region-East and Atlantic Ocean Region-West through the GES in Southbury, Connecticut (WA-28), in the Pacific Ocean Region through the GES in Santa Paula, California (KA-31), and in the Indian Ocean Region through the GES facility in Anatolia, Turkiye, to maritime customers as described in this order.

6. IT IS FURTHER ORDERED that Comsat shall, pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, file a tariff for the services authorized in this order before offering services to the public.

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*See* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See* TAO-1863 (July 23, 1991) and TAO-1844 (May 30, 1991).

[2] Comsat states that the transmitting and receiving characteristics set forth in its GES licenses will not change as a result of the installation and operation of the minimal equipment necessary to provide the point-to-multipoint service, and, therefore, it is not requesting authority to modify those licenses under Title III of the Communications Act.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Delegation of Authority in
Forfeiture Proceedings

ORDER

Adopted: May 11, 1992; Released: May 19, 1992

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. By Order adopted April 8, 1992, and released April 14, 1992, the Commission amended its rules to increase the amounts of forfeitures that may be imposed by Commission Bureaus and Offices in forfeiture proceedings conducted under delegated authority. By this *Order,* we further delegate authority to Field Operations Bureau (FOB) staff to impose forfeitures in consonance with Commission, Bureau, and Office of Managing Director policies and procedures.

II. BACKGROUND

2. The Commission's forfeiture policies are set forth in Section 1.80 of the Commission Rules, 47 C.F.R. §1.80, and its *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd 4695 (1991), recon. pending.

3. The Managing Director has established procedures for "Forfeiture Tracking, Collections and Follow-Up Systems," FCC INST. 1157.1, Effective April 1, 1992.

4. The Chief, Enforcement Division, FOB, is responsible for developing and carrying out the agency Enforcement Plan and administering all activities necessary to do so. This includes overseeing the bureau forfeiture proceedings.

5. The field offices of the FOB execute the Enforcement Plan. They detect individual violations, issue sanction notices, and carry out forfeiture proceedings in individual cases. They are primarily responsible for obtaining compliance with Commission rules.

III. DISCUSSION

6. Initiation of forfeiture proceedings at the field level has proven to be an effective method of improving compliance. The immediacy of the sanction to detection of the violation is particularly important.

7. Imposing forfeitures in the field is most efficient. It does not require preparation of lengthy reports and briefings and places the most knowledgeable persons in direction of the activity.

8. Centralized direction and policy review by Enforcement Division, FOB, assures that uniformity and overall Commission policy are maintained.

9. Procedures established by the Managing Director insure conformity with standard collection and follow-up practices.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED that the Chief, Enforcement Division, FOB, is DELEGATED authority to impose forfeitures in amounts up to, and including, $20,000.

11. IT IS FURTHER ORDERED that the Engineers-in-Charge of the field offices (EICs) of the FOB and the Chief Watch Officer are DELEGATED authority to impose forfeitures in amounts up to, and including, $20,000 in accordance with policy guidelines established by the Chief, Enforcement Division, FOB, or specific instructions provided by her.

12. IT IS FURTHER ORDERED that all Petitions for Reconsideration submitted pursuant to Section 1.106 of the Commission Rules, 47 C.F.R. §1.106, shall be reviewed by the Chief, Enforcement Division, FOB, and referred to me for disposition; and that all Applications for Review submitted pursuant to Section 1.115 of the Commission Rules, 47 C.F.R. §1.115, shall be reviewed by the Chief, Enforcement Division, FOB, and referred to me for referral to the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-426

In re Application of

SHAWN PHALEN File No. BPH-851231MO

JAMES EVANS File No. BPH-851231MR

For Construction Permit for
New FM Broadcast Station at
Montecito, California

MEMORANDUM OPINION AND ORDER

Adopted: May 11, 1992; Released: May 20, 1992

By the Review Board: MARINO (Chairman) and BLUMENTHAL.

1. The Board has before it (1) the *Memorandum Opinion and Order*, FCC 92M-460, released April 15, 1992 by Administrative Law Judge Walter C. Miller (ALJ) in which he (a) approved a settlement dismissing the application of Ellwood Beach Broadcasting, Ltd.[1] and; (b) certified the proceeding back to this Board for appropriate disposition.[2] By motion of April 23, 1992, Shawn Phalen has filed a "Request For Issuance of Final Order," seeking the Board's disposition of the underlying comparative case for purposes of Sections 1.106 and 1.115 of the Commission's Rules.[3]

2. With the dismissal of two of the (previous four) remaining applicants (*see supra* note 1), our resolution of this case is greatly simplified. In our prior review, *see Shawn Phalen, supra* note 2, we had affirmed the ALJ's disqualification of Phalen on a real-party-in-interest issue. *See* 7 FCC Rcd at 623-26. Our prior order affirming Phalen's disqualification is here incorporated by reference. While not according James Evans any ownership/management integration credit, *see id.* at 627, no disqualifying conduct marred his application, and Phalen asserts nothing oppositive in its instant pleading. Having affirmed the disqualification of Phalen, Evans is the prevailing party, *ipso jure*.

3. ACCORDINGLY, IT IS ORDERED, That the application of James Evans (File No. BPH-851231MR) for authority to construct a new FM station at Montecito, California, IS GRANTED, and the application of Shawn Phalen (File No. BPH-851231MO) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] A fourth remaining applicant, Spirit Broadcasting, was dismissed pursuant to the ALJ's *Memorandum Opinion and Order*, FCC 92M-334, March 17, 1992. By virtue of the dismissal of Spirit and the settlement between Ellwood Beach and James Evans, only two (of the original seven) parties remain in this case: James Evans and Shawn Phalen.

[2] As the ALJ observed in his April 15 *MO&O*, this proceeding was remanded for hearing solely on basic qualifying issues against Spirit and Ellwood Beach, *see Shawn Phalen*, 7 FCC Rcd 623 (Rev. Bd. 1992), both of which have since elected to dismiss. Hence, no further hearings are indicated.

[3] These rules would, respectively allow a party to file either a petition for reconsideration with the Board or an application for review with the full Commission, *see* 47 CFR §§ 1.106, 1.115.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-92

In the Matter of

Establishment of
Systems of Records
Exempt Under the Privacy Act

NOTICE OF PROPOSED RULE MAKING

Adopted: April 16, 1992; Released: May 12, 1992

Comment Date: June 11, 1992
Reply Comment Date: June 26, 1992

By the Commission: Commissioner Quello issuing a statement.

I. INTRODUCTION

1. By this Notice of Proposed Rule Making, the Commission proposes to amend section 0.561 of the Commission's Rules to exempt two new systems of records from certain provisions of the Privacy Act of 1974, 5 U.S.C. Section 552a.[1] The proposed two systems of records would be entitled "FCC/OIG-1, Criminal Investigative Files" and "FCC/OIG-2, General Investigative Files." The first system of records is limited to records on individuals, including present and former FCC employees, who are or have been the subjects of investigations conducted by the Office of Inspector General (OIG) in accordance with the Inspector General's authority derived from the Inspector General Act of 1978, as amended. These criminal investigations arise within the context of alleged violations of criminal laws which proscribe fraud and abuse in the execution of the Commission's programs and operations. The second system of records will contain investigative material compiled for general law enforcement purposes.[2]

II. DISCUSSION

2. FCC/OIG-1. The Privacy Act allows the head of any agency to promulgate rules to exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is maintained by any agency or component thereof which performs as its principal functions any activity pertaining to the enforcement of criminal laws, as follows:

> (a) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;
>
> (b) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or
>
> (c) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

3. The contents of proposed system FCC/OIG-1 is limited to the information of the type described above. It will be maintained by the OIG, a component of FCC, which performs as one of its principal functions activities pertaining to the enforcement of criminal laws. The authority for the criminal law enforcement activities of the OIG is the Inspector General Act of 1978, 5 U.S.C. Appendix 3. This statute authorizes the IG to conduct criminal investigations relating to programs and operations of the FCC. In accordance with 5 U.S.C. 552a(j)(2), we propose to exempt the information maintained in this system of records from all of the provisions of the Privacy Act except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (e)(7), (e)(9), (e)(10), (e)(11) and (i).[3]

4. In general, the disclosure of information contained in the criminal investigative files, including the names of persons or agencies to whom the information has been transmitted, would substantially compromise the effectiveness of OIG investigations. Knowledge of such investigations could enable suspects to take such action as is necessary to prevent detection of criminal activities, conceal or destroy evidence or escape prosecution. Disclosure of this information could lead to the intimidation of, or harm to, informants, witnesses, and their families, and could jeopardize the safety and well-being of investigative and related personnel and their families. The imposition of certain restrictions on the manner in which investigative information is collected, verified or retained would significantly impede the effectiveness of OIG investigatory activities and, in addition, could preclude the apprehension and successful prosecution of persons engaged in fraud or criminal activity. The exemption is needed to maintain the integrity and confidentiality of criminal investigations and to protect individuals from harm. The specific reasons for exempting this system of records are discussed below.

5. Section (c)(3) of the Privacy Act requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families and lead to the improper influencing of witnesses, the destruction of evidence or the fabrication of testimony.

6. Section (c)(4) of the Privacy Act requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since this system of records is being exempted from subsection (d) of the Act concern-

ing access to records, this section is inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

7. Section (d) of the Privacy Act requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential criminal violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his/her activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety or confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony and disclosure investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

8. Section (e)(1) of the Privacy Act requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his/her jurisdiction. In the interest of effective law enforcement, OIG investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

9. Section (e)(2) of the Privacy Act requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation, thereby enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence or to fabricate testimony. Moreover, in certain circumstances the subject of an investigation cannot be required to provide information to investigators and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

10. Section (e)(3) of the Privacy Act requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation and this could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

11. Sections (4)(G) and (H) of the Privacy Act requires an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempted from subsection (f) and (d) of the Act. Although the system would be exempt from these requirements, the Commission has published some information concerning the availability of these procedures for records in this system because, under certain circumstances, the OIG could decide it is appropriate for an individual to have access to all or a portion of his/her records in this system of records. *See* attached description of system of records entitled: FCC/OIG-1: Criminal Investigative Files.

12. Section (e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures.

13. Section (e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines "maintain" to include the collection of information, complying with this provision could prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which may seem unrelated, irrelevant, or incomplete when collected can take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

14. Section (e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

15. Section (e)(12) requires that, if an agency is a recipient agency or a source agency in a matching program with a non-Federal agency, the federal agency must publish notice of the establishment or revision of such program in the Federal Register at least 30 days prior to conducting the program. At this time, this provision is not applicable to the Commission.

16. Section (f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his/her request if any system of records named by the individual contain a record pertaining to him/her. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable.

17. Section (g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since this system of records would be exempt from subsections (c)(3) and (4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H) and (e)(4)(I), (e)(5), (e)(8) and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable to the extent that this system of records will be exempted from those subsections of the Act.

18. *FCC/OIG-2.* The Privacy Act also allows the head of any agency to promulgate rules to exempt any system of records within the agency from subsections (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) of this section if the system of records is investigative material compiled for law enforcement purposes. The proposed FCC OIG-2 will contain investigative material compiled for law enforcement purposes and maintained by the OIG. The OIG is authorized by the Inspector General Act to conduct investigations relating to programs and operations of the Federal Communications Commission. In general, the exemption is needed to maintain the integrity and confidentiality of law enforcement investigations. The specific reasons for exempting this system of records are discussed below.

19. Section (c)(3) of the Privacy Act requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families and lead to the improper influencing of witnesses, the destruction of evidence or the fabrication of testimony.

20. Section (d) of the Privacy Act requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential law violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his/her activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety or confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony and disclosure investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

21. Section (e)(1) of the Privacy Act requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his/her jurisdiction. In the interest of effective law enforcement, OIG investigators should retain this information, since it can aid in establishing patterns of illegal activity and can provide valuable leads for other law enforcement agencies.

22. Sections (e)(4)(G) and (H) of the Privacy Act requires an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to

the extent that this system of records will be exempted from subsection (f) and (d) of the Act. Although the system would be exempt from these requirements, OIG has published some information concerning the availability of these procedures for records in this system because, under certain circumstances, OIG could decide it is appropriate for an individual to have access to all or a portion of his/her records in this system of records. *See* attached description of system of records entitled: FCC/OIG-2: General Investigative Files.

23. Section (e)(4)(I) of the Privacy Act requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures.

24. Section (f)(1) of the Privacy Act requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his/her request if any system of records named by the individual contain a record pertaining to him/her. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

III. OTHER MATTERS

25. This Notice of Proposed Rule Making is issued under the authority contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i) and 303(r), and Sections (j)(2) and (k)(2) of the Privacy Act, 5 U.S.C. Sections 552a(j)(2); (k)(2). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before **June 11, 1992** and reply comments on or before **June 26, 1992.** To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

26. This is a nonrestricted notice and comment Rule Making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

27. We certify that the Regulatory Flexibility Act of 1980 does not apply to this Rule Making proceeding because if the proposed rule amendments are promulgated there will not be a significant economic impact on a substantial number of small entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The proposed rule amendment merely exempts systems of records from certain access and disclosure requirements under the Privacy Act, and is not expected to have any economic impact. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance in the paragraph 603(c) of the Regulatory Flexibility Act, 5 U.S.C. Section 601 *et seq.*

IV. ORDERING CLAUSE

28. Accordingly, IT IS ORDERED, that, pursuant to Sections 4(i) and 303(r) of the Communications Act and Sections (j)(2) and (k)(2) of the Privacy Act, NOTICE OF PROPOSED RULE MAKING is hereby provided as indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part O - COMMISSION ORGANIZATION

1. The authority citation for Part O continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 225 unless otherwise noted. Implement 5 U.S.C. 552, unless other noted.

2. Section 0.561 is amended by adding two new paragraphs as follows:

Section 0.561 Exemptions.

* * * * *

(f) System name. Criminal Investigative Files--FCC/OIG-1. Compiled for the purpose of criminal investigations. This system of records is exempt under the provisions of section (j)(2) of the Privacy Act because the records contain investigatory material compiled for criminal law enforcement purposes.

(g) System name. General Investigative Files--FCC/OIG-2. Compiled for law enforcement purposes. This system of records is exempt under the provisions of section (k)(2) of the Privacy Act because the records contain investigatory material compiled for law enforcement purposes.

FOOTNOTES

[1] A system of records is a group of records under an agency's control from which information is retrieved by the individual's name or by some other unique personal identifier, such as social security number. *See* 5 U.S.C. Section 552a(a)(5).

[2] The proposed rule is typical of other federal agency rules in this area. *See* 16 C.F.R. Section 4.13(m); 17 C.F.R. Section 200.313.

[3] In general, these provisions allow the disclosure of information from systems of records pursuant to the Freedom of Information Act or pursuant to a court order, to agency employees on a "need to know" basis, to Congress, to certain agencies such as the Bureau of Census and the National Archives, and to law enforcement agencies when the information is requested by the head of such agency. Further, these provisions set forth certain administrative and accounting requirements that agencies must meet in connection with systems of records pertaining to criminal investigations.

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO

RE: In the Matter of Establishment of Systems of Records Exempt Under the Privacy Act.

I support seeking comment on what records, if any, should be exempt under the Privacy Act. I recognize the need to gather information relating to alleged wrong doings and the need to protect those who may be participating in such investigations. At the same time, caution must be exercised whenever individuals' access to information is restricted, especially when such information may affect their careers. In cases where investigations conclude no wrong doing on the part of employees, I believe individuals should have access to records, or at least be assured that the records are sealed and destroyed in a relatively short time. Maintaining records on individuals--especially when they are found innocent--seems inconsistent with the basic principles of justice and due process. Such records, no matter how securely maintained, always run the risk of falling into unauthorized hands and may jeopardize careers, the very concerns that prompted Congress to vote the Privacy Act. I look forward to the comments to be filed in this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-44

In the Matter of

Procedure for measuring
electromagnetic emissions
from digital devices.

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 16, 1992; Released: May 21, 1992

By the Commission:

INTRODUCTION

1. By this action, the Commission amends Part 15 of its Rules to permit the use of the National Standard, C63.4-1991 (C63.4) except for Sections 5.7, 9 and 15, for compliance measurements on digital devices (formerly called computing devices).[1, 2] C63.4 replaces the current FCC measurement procedure, FCC/OET MP-4 (1987), entitled "FCC Procedure for Measuring RF Emissions from Computing Devices." This action also amends Part 2 of the Commission's Rules to replace the present site attenuation requirements with the criteria in C63.4 for a test site used for testing digital devices. C63.4 represents a joint effort between industry and the Commission to reach a consensus agreement on state-of-the-art procedures for measuring the electromagnetic emissions from digital devices. It also harmonizes these procedures with international test procedures for such devices. Adoption of this test procedure will benefit both digital device manufacturers and the Commission.

BACKGROUND

2. In the *Notice of Proposed Rule Making (NPRM)* in this proceeding, the Commission proposed to replace MP-4 with a new test procedure to be designated TP-5.[3] The comments submitted in response to the *NPRM* expressed many reasonable differing viewpoints on the best way to measure emissions from digital devices. In view of these differences, the Commission elected to work with the voluntary industry standards developing organization, American National Standards Institute (ANSI) C63 Committee, to obtain a consensus agreement among the concerned industry parties before adopting a digital device measurement procedure.[4] In a joint effort between the Commission staff and the ANSI C63 Committee, ANSI C63.4-1988 was revised and modified for use in testing digital devices. [5] Each technical issue received considerable debate in the C63 Committee before a compromise was agreed upon and accepted as the best possible solution to that issue. The resulting test procedure basically follows the technical framework and initiatives set forth in the TP-5 proposal and includes appropriate procedures for resolving the many technical issues raised in this proceeding. We reviewed C63.4 after it was revised and approved by C63 as a National Standard and found that it appears to meet our needs for testing digital devices for compliance with Part 15 of the FCC Rules. Accordingly, the Commission adopted a *Further Notice of Proposed Rule Making (FNPRM)* proposing to replace MP-4 with C63.4 instead of TP-5.[6]

3. Twenty parties, consisting of individuals, trade associations, digital device manufacturers, and test firms filed comments in response to the *FNPRM*. Ten parties filed reply comments. A list of the parties filing comments and reply comments is contained in Appendix B.

ADOPTION OF C63.4 FOR TESTING DIGITAL DEVICES

4. An overwhelming majority of the commenting parties support the adoption of C63.4. These parties state that C63.4 represents a reasonable industry consensus of the state-of-the-art techniques for measuring electromagnetic emissions from digital devices.[7] Further, they submit that the differing viewpoints on testing of digital devices raised in the *NPRM* have been resolved in a technically competent manner. Many of the supporting parties also observe that adoption of C63.4 will provide harmonization of the FCC test procedures with the procedures contained in, or proposed for, inclusion in CISPR Publication 22, the international test procedure for measuring Information Technology Equipment (ITE).[8] They state that this will simplify the procedures for determining compliance of digital equipment marketed in both the U.S.A. and in other countries.

5. Linear Corporation (Linear) opposes adoption of C63.4 as the Commission's procedure for measuring emissions from digital devices. Linear, a manufacturer of low power transmitters, asserts that C63.4 leaves several important issues unresolved or "to be determined" and, hence, it cannot or should not be adopted by the Commission as a testing standard. The unresolved issues in C63.4 to which Linear refers concern the testing of low power transmitters (intentional radiators) operating pursuant to Part 15 of the Rules. Linear also opposes adoption of C63.4 on the grounds that the calibrations specified for measurement instrumentation, antennas and line impedance stabilization networks are excessively burdensome. It argues that these calibrations must be made too frequently and are overly expensive because they must be traceable to a national standard. Several commenters state that annual calibration of the measurement equipment and antennas, with traceability to a national standard as called for in C63.4, represents good engineering practice. Linear also objects to the requirements in C63.4 for reporting AC power line voltage and frequency, ambient temperature, and including photographs of the test set-up. It contends that these requirements are unnecessarily burdensome and do not enhance measurement repeatability.

6. The American Council of Independent Laboratories, Inc. (ACIL) urges the Commission to delay adoption of C63.4 until Section 2.948 of the FCC Rules can be modified to include requirements for laboratory accreditation.[9] It contends that such requirements are needed to ensure laboratory performance and quality.[10] A number of parties support the ACIL position to the extent that the Commission should institute an inquiry into this issue. However,

they disagree with ACIL that the Commission should withhold action on adoption of C63.4. As they note, this proceeding has been active for over 2 years and a new digital device test procedure is urgently needed. Further, they state that no justifiable reason has been given by ACIL to withhold adoption of C63.4 any longer.

7. Several parties recommend a number of additional changes to C63.4. For example, GTE argues that C63.4 is too restrictive in Section 6.5, since it limits the range of temperature in which testing can be accomplished and thereby precludes testing in colder climates. Memorex suggests that Section 5.1.2 be amended to specify that ambient radio noise levels be 10 dB below the limit instead of 6 dB. Memorex further requests that Sections 10.1.8.1 and 10.1.8.2 be amended to require reporting all emissions within 3 dB of the respective limit. Finally, Spectrum Measurement Corporation (Spectrum) requests modifications of Section 10.1.4 to eliminate the requirement for filing a list of the test equipment used for performing the measurements and Section 10.1.5 to permit reporting data in units other than dBuV or dBuV/m.

8. We continue to believe that C63.4 is the appropriate test procedure for determining compliance of digital devices with our rules. Use of this new test procedure will provide state-of-the-art techniques for measuring digital equipment and will clarify the methods laboratories are to use in testing such equipment for compliance as discussed by the commenting parties. It will also harmonize our domestic test procedure with the international procedure for measuring RF emissions from ITE, and thereby reduces the regulatory burden on manufacturers who market the same equipment in the United States and other countries. Accordingly, we find it is in the public interest to incorporate ANSI C63.4-1991 into the FCC Rules by reference as the procedure to be used to determine compliance of digital devices with the Part 15 technical standards.[11]

9. We disagree with the objections to C63.4 raised by Linear. First, the C63.4 test procedure is sufficiently complete for use in determining compliance of digital devices. The procedures for measuring low power transmitters that Linear is concerned about are not needed for measuring RF emissions from digital devices. Indeed, these procedures will not be used for measuring digital devices even after they are added to C63.4 in the future.[12] Second, the calibration and traceability requirements in C63.4 are necessary for obtaining repeatable test results. Traceability to a national standard, such as those available through the National Institute of Standards and Technology (NIST), is essential to ensure that test results obtained with this procedure are reliable. Moreover, it is unlikely that repeatable measurements could be obtained from site to site. Further, we note that the cost of achieving this traceability can be mitigated by the appropriate use of secondary standards.[13] Lastly, we find that C63 reached the proper balance between the burden of collecting and reporting information and the need to record information that is directly relevant to compliance with the FCC Rules. Accordingly, we reject Linear's argument on this point.

10. We also reject ACIL's request to delay the implementation of C63.4, since there is a need to make the procedures in C63.4 available as soon as practical. We see no reason to delay implementation of this new test procedure until the issues concerning laboratory accreditation are resolved. We have also reviewed each of the comments requesting proposed changes to C63.4 and find that they do not add any benefits for determination of compliance or for reducing the public burden. We, therefore, agree with the decisions reached by C63 on these topics.

IMPLEMENTATION ISSUES

11. Several parties state that the Normalized Site Attenuation (NSA) measurements in C63.4 should be the sole determining factor for site acceptability. They argue that a test site may not meet all of the physical site characteristics described in Section 5.4.1 of C63.4, but still could meet the NSA acceptability criteria. They contend that NSA measurements alone should be sufficient evidence to determine site acceptability. We agree that NSA is a primary factor in determining the quality of a test site; however, in some situations, the data alone may not be sufficient. For example, in our review of test site descriptions, we have noticed that the horizontal site attenuation data now required is sometimes measured incorrectly. At other times, the data from these measurements is interpreted improperly. This can lead to situations where the site attenuation data appear to satisfy the required criteria, but the physical characteristics of the site make the results suspect. Therefore, we believe the physical site characteristics in C63.4 are indeed important and should be followed when constructing and evaluating a test facility. Accordingly, the Commission will use NSA measurements in conjunction with the physical site characteristics to evaluate open area test sites, as specified in C63.4.

12. Several parties filing comments object to Section 5.4.4 of C63.4, which stipulates that after January 17, 1994, test sites that are used for testing floor-standing equipment must have flush-mounted turntables. They argue that many test sites have raised turntables and the requirement for flush-mounted turntables would add unnecessary costs to a test site. The issue of raised versus flush-mounted turntables was discussed in considerable detail at several meetings of C63. It was generally agreed that substantially different test results would be obtained if essentially the same equipment were measured under the two separate conditions, i.e., on a flush-mounted turntable and on a raised turntable. To ease the economic burden to those sites with raised turntables, C63 provided a three year transition period for installation of flush-mounted turntables. We agree with the decision taken by C63 and affirm the three year transition period. It should be noted that test laboratories can continue to use a raised turntable for the measurement of table-top systems even after January 17, 1994, provided the site attenuation measurements meet the criteria in C63.4 with the turntable in place. A flush-mounted turntable is required *only* when testing floor-standing digital equipment.

13. Linear and Xerox request that the Commission permit the use of log periodic antennas for measurements above 1 GHz as an alternative to the linearly polarized horn antennas recommended in Section 4.1.5.4 of C63.4. Linear reports using log periodic antennas with satisfactory results. Xerox suggests that log periodic usage be permitted up to 5 GHz. They both argue that log periodic antennas are just as accurate as horn antennas and that these antennas are easier to use. We agree with C63 that the preferred antenna for measurements above 1 GHz is the horn antenna. Our concern with use of log periodic antennas for measurements above 1 GHz is two-fold. First, the log periodic antenna is not as directional as a horn antenna and tends to pick up reflections from objects around the

EUT. These reflections will vary from site to site, producing different test results. Second, horn antennas are more sensitive and can detect and receive weaker signals than those of log periodic antennas. Nevertheless, while we have these reservations about the performance of log-periodic antennas, we will permit their use. In this regard, we note Section 10.1.9 of C63.4 permits flexibility when performing emissions measurements above 1 GHz, including the use of antennas other than horn antennas (*e.g.*, log periodic antennas). However, in cases of dispute, measurement data obtained using a horn antenna shall take precedence.

14. Cray Research, Inc. (Cray), a manufacturer of large supercomputers, purports that C63.4 and MP-4 do not adequately address the special problems of testing supercomputers, which because of their size and power requirements, cannot be tested on a standard test site. Cray argues that a single set of measurements at the end user's facility (in-situ) should be considered sufficient for approval of such equipment. The firm claims it is too expensive and impractical to measure its computers at three separate locations. Several other commenting parties disagree. They argue that one set of measurements is not sufficient to characterize the emission profile of a large computer system measured in situ.

15. Under the present procedures in MP-4, the Commission permits large equipment, such as supercomputers, to be tested for compliance in-situ. However, because of repeatability problems, the test results are unique to that location and are not representative of the same equipment at other locations. As a partial compromise to the manufacturers of large systems, MP-4 permits generic approval of such equipment based on measurements of essentially the same equipment at three different locations. This provision was endorsed by C63 and is included in C63.4. In addition, it is consistent with Section 15.31(d) of the FCC Rules.[14] While we reaffirm the industry consensus that three sets of measurements are needed for in-situ measurements, we will allow a wide degree of latitude in what constitutes essentially the same system for large supercomputers.

16. CBEMA and other commenters request that the Commission clarify how it will treat the Appendices to C63.4, which contain additional explanatory information not included in the main text of the test procedure. CBEMA argues that the main text of C63.4 should take precedence over the Appendices. In support of this position, it points to the statement preceding the Appendices, which declares that the Appendices are not part of the standard, but are included for information only. In our opinion, the meaning of this statement is ambiguous, since the Appendices are, indeed, included as part of the standard and, more importantly, they provide valuable information for the user of the standard. The information contained in the text of C63.4 provides guidance for testing a plethora of devices and, for this reason, has to be general in its description of the set-up and testing methodology. Each Appendix provides more explicit details for the testing of a specific class of device. The Appendices are intended for, and will be particularly useful to, professionals in companies who do not possess extensive experience testing personal computers. Use of Appendices D and E of C63.4, for example, will allow them to test a PC with some assurance that the results will be consistent with the results the Commission would obtain if it measured that same unit.[15] The C63 Committee and the FCC staff expended considerable effort to ensure that the main text in C63.4 and Appendix E are in agreement. In our opinion, the same test results can be obtained when using either the main text of C63.4 or Appendix E for testing a PC, but use of the main text requires more knowledge of EMC testing. The Commission staff will use Appendices D and E for determining the compliance of personal computers and peripherals.

17. CBEMA, Xerox, Tandy Corporation (Tandy) and AT&T request that the Commission clarify how future editions of C63.4 might be adopted into the Rules without violating the Administrative Procedure Act (APA).[16] We recognize that there will be need to update and improve C63.4. Since C63.4 has general applicability to numerous devices, in many cases these updates may not affect measurement of digital devices for compliance and therefore would not warrant public notice.[17] Therefore, we delegate to the Chief Engineer the authority to modify the rules to reference future versions of C63.4 that do not raise substantive compliance issues. At the same time, we recognize the necessity to provide opportunity for notice and comment on any substantive changes or modifications that could affect compliance with our regulations. In cases where there may be some question as to whether there are substantive compliance issues, the Commission will issue a Public Notice inviting comment from all interested parties. In any instance where substantive changes have been made that could affect compliance, the Commission will initiate an appropriate rule making proceeding to consider the adoption of the updated version of C63.4.

18. Tandy notes that C63.4 references a number of supporting industry standards dealing with such things as measurement instrumentation, test site construction, and antenna calibration. Tandy observes that C63.4 indicates that if any of the referenced standards are updated, the updates take precedence. Tandy is concerned that this, in effect, establishes a situation where C63.4 could be updated, affecting compliance measurements, without the benefit of a Commission rule making proceeding. We recognize the need to avoid modifications to our test procedure that might be implemented without our specific action.[18] We therefore will treat updates to the supporting industry standards referred to in C63.4 in the same manner as updates to C63.4 itself. That is, any changes to industry standards referenced in C63.4 will be incorporated into the test procedure only upon appropriate delegated action by the Chief Engineer or by rule making by the Commission. The applicable version of a reference standard will be the most recent version specifically adopted through action by the Chief Engineer or the Commission.

19. A number of parties support the establishment of an industry advisory panel to assist the Commission in making interpretations of C63.4 when needed. Xerox, in reply comments, cautions that such a panel may impede the Commission's ability to make the necessary interpretations in an expeditious manner and, in some cases, may compromise the confidentiality of new technology before it reaches the marketplace. We are sympathetic with industry's desire to be a part of the interpretation process and, most importantly, to be aware of all interpretations of C63.4.[19] However, we must retain the flexibility to make interpretations quickly to satisfy inquiries and to maintain confidentiality for companies expending considerable resources developing new technology. Therefore, we will interpret C63.4, as required, to handle immediate ques-

tions and maintain confidentiality as necessary. To the extent possible, we will place FCC interpretations of C63.4 that may be of general interest on the Commission's Public Access Link (PAL).[20] The FCC staff will also hold public meetings and consult with C63, as appropriate, to handle any major issues of interpretation that may arise.

20. Most of the commenting parties support the proposed 1 year transition period from MP-4 to C63.4. However, GTE advocates a 2 year transition period, while DS&G and CEG-EIA request a 3 year period. They argue that the new test site requirements in C63.4 will necessitate burdensome changes to, or relocation of, some existing test sites. While we believe that test facilities should apply the latest information to assess the quality of their site, we are sympathetic to the economic impact of required changes to test facilities. Therefore, while we will encourage the immediate transition to C63.4, we will provide a longer period for transition to ease the impact on test laboratories. Accordingly, we will permit the continued use of MP-4 and OET 55 until May 1, 1994.[21] Until this date, sample testing at the Commission's Laboratory will be performed using the same procedure which the equipment manufacturer used for determining compliance. After this date, applications for certification and equipment verification reports must contain test data obtained through use of C63.4. Pre-grant testing at the Commission's Laboratory after this date will be performed using C63.4; however, post-grant testing will be performed using the same procedure used by the manufacturer in determining compliance.

21. Several commenting parties urge the Commission to ask the IEEE to remove its copyright from the C63.4 document to allow dissemination of the test procedures. They argue that large companies and test laboratories need to distribute this procedure to numerous test personnel at multiple facilities. These parties contend that purchase of a large number of copies of this document could be expensive. In addition, they purport that Commission adoption and participation in the development of this document makes it a government document and, as such, a part of the "public domain". They add that government documents cannot have copyrights attached to them. In a letter to the Commission dated August 22, 1991 from the IEEE Standards Department, the IEEE Standards Administrator stated:

> Our practice is to not release copyright under any circumstances. The copyright is categorically held by IEEE in all cases, so as to ensure the protection and integrity of a standards' existing text, including future revisions.

This policy is universal to all industry standards incorporated by reference into government regulations by federal and state agencies. We do not believe that the copyright of C63.4 and the relatively modest cost of the document are in any way an impediment to compliance or use of the C63.4 test procedure. This expense is clearly warranted as a way for the standards-developing organization to support its activities. Accordingly, we will not request the IEEE to relinquish its copyright of the C63.4 standard.

22. CBEMA and IBM comment that digital devices originally tested using MP-4 procedures and found to be compliant with the FCC Rules may not comply when retested using C63.4 procedures. Therefore, they request perpetual grandfathering of devices originally tested using MP-4. We agree and therefore will permit devices originally tested using MP-4 to be retested using MP-4 for purposes of determining continued compliance. This includes tests made to determine compliance of permissive changes. Digital devices that are either verified by the manufacturer or submitted to the Commission for certification on or after May 1, 1994, must be tested using the C63.4 procedures.

FINAL REGULATORY FLEXIBILITY ANALYSIS

23. Pursuant to the Regulatory Flexibility Act of 1980, the Commission's final analysis is as follows:

I. Need and purpose of this action:

In the course of performing testing on digital devices at the Commission's Laboratory, a significant percentage of these devices have been found to be non-compliant with the electromagnetic emission limits in the FCC Rules, Part 15. Revisions to the procedure are necessary in order to provide more specific information on how the Commission is testing such devices, as well as implementing certain changes to the test procedures requested by industry. C63.4 is being incorporated into the Rules by reference to provide adequate notice to the public on how digital devices are actually tested by the Commission and to make clear that this test procedure has the force of rules.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

No commenting parties responded to issues raised in the Initial Regulatory Flexibility Analysis.

III. Significant alternatives:

The Commission has considered all of the alternatives proposed in the NPRM and FNPRM all timely filed comments directed to the various issues. The only significant alternative would be to proceed with the adoption of TP-5, with modifications based on the record. We believe, however, that use of C63.4 represents the best available solution to the myriad of problems involved in testing digital devices. The record in this proceeding strongly supports this conclusion. Therefore, we have decided to incorporate C63.4 into the Rules by reference.

ORDERING CLAUSE

24. Accordingly, IT IS ORDERED that under the authority contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, Part 2 and Part 15 ARE AMENDED as set forth in Appendix A below, effective thirty days after publication in the Federal Register. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 2 of Chapter I, Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 2 continues to read as follows:

Authority: Sec. 4, 302, 303 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154, 302, 303, and 307, unless otherwise noted.

2. Section 2.948, paragraph (b) is amended by revising paragraph (8) to read as follows:

Section 2.948 Description of measurement facilities.

(b) * * *

* * * * *

(8) A plot of site attenuation data.

(i) For a measurement facility that will be used for testing radiated emissions from a digital device for certification or verification on or after May 1, 1994, the site attenuation data shall be taken pursuant to the procedures contained in Sections 5.4.5 through 5.5 of the following procedure: American National Standards Institute (ANSI) C63.4-1991, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on March 21, 1991, with a correction sheet dated July 2, 1991, as document number SH13896. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of ANSI C63.4-1991 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, Telephone 1-800-678-4333. Copies of ANSI C63.4-1991 may be inspected at the following locations: (1) Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, DC, (2) Federal Communications Commission, 2025 M Street, N.W., Office of Engineering and Technology (Room 7002), Washington, DC, or (3) Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, DC.

(ii) For a measurement facility that will be used for testing radiated emissions from a device other than a digital device or, prior to May 1, 1994, from a digital device, the site attenuation data shall be taken pursuant to either ANSI C63.4-1991, Sections 5.4.5 through 5.5, or FCC/OET Bulletin 55. See above paragraph (Section 2.948(b)(8)(i)) for more information on ANSI C63.4-1991.

(iii) This requirement does not apply to equipment that is not measured on an open field test site.

* * * * *

Part 15 of Chapter I, Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 15 continues to read as follows:

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154, 302, 303, 304, and 307.

2. Paragraph (a) of Section 15.31 is revised to read as follows:

Section 15.31 Measurement standards.

(a) The following measurement procedures are used by the Commission to determine compliance with the technical requirements in this Part. Except where noted, copies of these procedures are available from the Commission's current duplicating contractor whose name and address are available from the Commission's Consumer Assistance Office at 202-632-7000.

(1) FCC/OET MP-1: FCC Methods of Measurements for Determining Compliance of Radio Control and Security Alarm Devices and Associated Receivers.

(2) FCC/OET MP-2: Measurement of UHF Noise Figures of TV Receivers.

(3) FCC/OET MP-3: FCC Methods of Measurements of Output Signal Level, Output Terminal Conducted Spurious Emissions, Transfer Switch Characteristics and Radio Noise Emissions from TV Interface Devices.

(4) FCC/OET MP-4 (1987): FCC Procedure for Measuring RF Emissions from Computing Devices. Note: This procedure may be used only on digital devices for which verification is obtained or an application for certification is filed, before May 1, 1994. For compliance testing of digital devices on or after May 1, 1994, see 15.31(a)(5) below.

(5) Digital devices for which verification is obtained, or an application for certification is filed, on or after May 1, 1994, are to be measured for compliance using the following procedure excluding Section 5.7, Section 9 and Section 15: American National Standards Institute (ANSI) C63.4-1991, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," published by the Institute of Electrical and Electronics Engineers, Inc. on March 21, 1991, with a correction sheet dated July 2, 1991, as document number SH13896. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. The Commission encourages the use of this procedure for testing digital devices as soon as practical. Copies of ANSI C63.4-1991 may be obtained from: IEEE Standards Department, 455 Hoes Lane, P.O. Box 1331, Piscataway, NJ 08855-1331, Telephone 1-800-678-4333. Copies of ANSI C63.4-1991 may be inspected during normal business hours at the following locations: (1) Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, DC, (2) Federal Communications Commission, 2025 M Street, N.W., Office of Engineering and Technology

(Room 7002), Washington, DC or (3) Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, DC.

(6) FCC/OET MP-9: FCC Procedures for Measuring Cable Television Switch Isolation.

* * * * *

APPENDIX B

PARTIES FILING COMMENTS TO FNPRM

Acronym	Party
AT&T	American Telephone and Telegraph Company
ACIL	American Council of Independent Laboratories, Inc.
C63	Accredited Standards Committee on Electromagnetic Compatibility, C63
CBEMA	Computer and Business Equipment Manufacturers Association
CEG-EIA	Consumer Electronics Group, Electronics Industries Association
Cray	Cray Research, Inc.
De Marinis	Mr. Joseph De Marinis
DS&G	Dash, Straus & Goodhue, Inc.
GTE	GTE Service Corporation
IBM	International Business Machines Corporation
Linear	Linear Corporation
Memorex	Memorex Telex Corporation
NAB	National Association of Broadcasters
QMS	QMS, Inc.
SAC	Standards Approval and Compliance, Inc.
Silicon	Silicon Graphics, Inc.
Spectrum	Spectrum Measurement Corporation
Tandy	Tandy Corporation
Wyse	Wyse Technology
Xerox	Xerox Corporation

PARTIES FILING REPLY COMMENTS TO FNPRM

Acronym	Party
AT&T	American Telephone and Telegraph Company
C63	Accredited Standards Committee on Electromagnetic Compatibility, C63
CBEMA	Computer and Business Equipment Manufacturers Association
CEG-EIA	Consumer Electronics Group, Electronics Industries Association
GTE	GTE Service Corporation
IBM	International Business Machines Corporation
Memorex	Memorex Telex Corporation
NAB	National Association of Broadcasters
Tandy	Tandy Corporation
TI	Texas Instruments Incorporated

FOOTNOTES

[1] Digital devices are defined in Section 15.3(k) of the Commission's Rules. Examples include computers, electronic cash registers, and video games.

[2] C63.4-1991, entitled "Methods of Measurement of Radio-Noise Emissions from Low-Voltage Electrical and Electronic Equipment in the Range of 9 kHz to 40 GHz," was approved as a National Standard on January 17, 1991, by the American National Standards Institute (ANSI).

[3] *See Notice of Proposed Rule Making* in General Docket No. 89-44, 4 FCC Rcd 2113 (1989).

[4] The Accredited Standards Committee on Electromagnetic Compatibility (EMC), C63, is a voluntary standards making organization accredited by the American National Standards Institute (ANSI) with the Institute of Electrical and Electronic Engineers, Inc. (IEEE) as its secretariat. C63 consists of representatives from a wide variety of concerned industry, trade, government and professional organizations (e.g., Computer and Business Equipment Manufacturers Association (CBEMA), Consumer Electronics Group, Electronics Industries Association (CEG-EIA), National Institute of Science and Technology (NIST), Federal Communications Commission (FCC), Department of Army, etc.). Over the years, C63 has developed voluntary industry standards for measurement instrumentation and techniques for measuring the interference potential of low voltage electrical and electronic devices, such as computers.

[5] C63.4-1988 contains much useful information for testing emissions from RF devices but does not address a number of areas that are important in the testing of digital devices.

[6] *See Further Notice of Proposed Rule Making* in General Docket No. 89-44, 6 FCC Rcd 600 (1991).

[7] Parties supporting the adoption of C63.4 for use in measuring emissions from digital devices include American Telephone and Telegraph Company (AT&T), Computer and Business Equipment Manufacturers Association (CBEMA), Consumer Electronics Group, Electronics Industries Association (CEG-EIA), Dash Straus & Goodhue, Inc. (DS&G), GTE Service Corporation (GTE), International Business Machines Corporation (IBM), Memorex Telex Corporation (Memorex), and Xerox Corporation (Xerox).

[8] CISPR is the French acronym for the International Special Committee on Radio Interference. This Committee is a voluntary standards making organization that operates under the auspices of the International Electrotechnical Commission, which develops international recommendations for controlling interference of various electrical and electronic equipment. These recommendations are often adopted by foreign administrations as the national law for controlling interference to radio communications. The European Community and other countries are proposing to use CISPR Publication 22 (CISPR 22), entitled "Limits and methods of measurement of radio interference characteristics of information technology equipment", for controlling interference from ITE. ITE is essentially the same equipment the Commission defines as a digital device. Most of the procedures contained in C63.4 have been or are in the process of being included in CISPR 22.

[9] Section 2.948 requires a test site description, which includes site attenuation data, to be filed with the FCC laboratory before radio noise measurements will be accepted by the Commission. (See 47 CFR 2.948)

[10] Concurrent with its comments, ACIL filed on May 7, 1991, a petition for Notice of Inquiry on the need for the FCC to establish laboratory accreditation requirements. The petition was placed on Public Notice by the Commission on June 5, 1991, in Rule Making No. 7730. The ACIL petition will be considered separately.

[11] Copies of the new test procedures for digital devices will be available for inspection during normal business hours at the following locations: (1) Federal Communications Commission, 1919 M Street, N.W., Dockets Branch (Room 239), Washington, DC, (2) Federal Communications Commission, 2025 M Street, N.W., Office of Engineering and Technology (Room 7002), Washington, DC, or (3) Office of the Federal Register, 1100 L Street, N.W., Room 8401, Washington, DC.

[12] C63 is currently working on a revision of C63.4 to incorporate the procedures for determining compliance of intentional radiators. The new version of C63.4 is expected to be adopted by ANSI in early 1992.

[13] Use of a secondary standard is when one measuring instrument is calibrated by an outside source that uses standards traceable to NIST. All calibrations of other measurement equipment may then be performed in-house as long as they are referred to that instrument.

[14] *See* 47 CFR Section 15.31(d).

[15] Appendix D sets forth a method of preliminary radiated emission maximization. Appendix E establishes step-by-step guidance for testing personal computers and associated peripherals.

[16] The Administrative Procedure Act, contained in 5 U.S.C. Section 553(d) (1982), prescribes the procedures that all Federal agencies must follow in order to give the general public an opportunity to comment upon proposed changes to Federal Regulations.

[17] For example, C63.4 is currently being considered for modification to include military test procedures and procedures for measuring low power transmitters, as mentioned above.

[18] This problem has been brought to the attention of C63. The next edition of C63.4 will remove the statement that a referenced standard may be superseded by a more current version.

[19] Non-public interpretations made by the Commission or its staff members are not legally binding on the agency or the public.

[20] The Public Access Link (PAL) system allows the public to access the FCC Laboratory's data base by dialing 301-725-1072 using their own computer and 300 or 1200 baud telephone modem. Among other things, the FCC data base contains information on equipment authorizations, Public Notices, FCC Bulletins, and test site lists.

[21] FCC/OET Bulletin 55, entitled "Characteristic of Open Field Test Sites," contains the procedures to be followed to perform horizontal site attenuation measurements for a test site description which is filed with the Commission pursuant to Section 2.948 of the current Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-111

In re Applications of:

DEAS COMMUNICATIONS, INC. (hereafter "Deas")	File No. BPH-910208MB
DRAGONFLY COMMUNICATIONS, INC. (hereafter "Dragonfly")	File No. BPH-910211MA
HEALDSBURG BROADCASTING, INC. (hereafter "HBI")	File No. BPH-910211MB
BECKWITH COMMUNICATIONS, INC. (hereafter "Beckwith")	File No. BPH-910211MI
DESERT ROCK LIMITED PARTNERSHIP (hereafter "Desert Rock")	File No. BPH-910211ML
HEALDSBURG EMPIRE CORPORATION (hereafter "Empire")	File No. BPH-910212MM
R.W. COMMUNICATIONS (hereafter "RWC")	File No. BPH-910211MJ (Previously Dismissed)

For Construction Permit for a
New FM Station on Channel 240A
in Healdsburg, California

HEARING DESIGNATION ORDER

Adopted: May 7, 1992; Released: May 20, 1992

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *Preliminary Matter.* On April 29, 1991, RWC filed a petition for reconsideration requesting reinstatement of its February 11, 1991 application which was returned for a tenderability defect.[2] RWC failed to certify that sufficient funds were available to construct and operate the facility as described in Form 301, Instruction III and the *Report and Order* in Gen. Dkt. 88-328 ("Revision of Application for Construction Permit for Commercial Broadcast Station"), 4 FCC Rcd 3853, 3859 (1989). Specifically, RWC checked "No" in Section III, Item 1 of FCC Form 301 and stated its intention to certify financial qualification by the amendment as-of-right date. On November 27, 1991, RWC requested that its petition for reconsideration be dismissed. After a careful review of the above-mentioned pleadings, we find nothing which would warrant continuation of these matters. Accordingly, the petition for reconsideration will be dismissed.

3. *Informal Objection.* An informal objection dated May 16, 1991, was filed by Healdsburg residents John and Barbara McDonough ("the McDonoughs"). They request that the Commission reconsider the allocation of FM Channel 240A in Healdsburg, California as authorized by the *Report and Order* in MM Docket 90-228, adopted October 30, 1990, 5 FCC Rcd 7026 (1990), because they believe that construction of a new tower would be a hazard to fire-fighting aircraft. The McDonoughs further state that the area receives weak television signals which are overpowered by FM radio communications. Finally, the McDonoughs argue that "[i]f the city of Healdsburg desires a FM station, the transmitter should be in the city limits."

4. The Commission has consistently held that local land use authority, because of their location, experience and awareness of local values, are best situated to resolve land use and related aesthetic questions. *Blair Broadcasting of California Inc.*, 55 RR 2d 619 (1984). Thus, the Commission accords deference to local authorities in these matters. *Implementation of National Environmental Policy Act*, 49 FCC 2d 1313, 1329 (1974). Furthermore, all of the applicants have received clearance from the FAA. Under the Commission's Rules, the permittee "... must satisfy all complaints of blanketing interference which are received by the station during a one year period." 47 C.F.R. § 73.318. Finally, the Commission has no rule requiring that the transmitter be located within the limits of the community of license. Under 47 C.F.R. § 73.315(a), "[t]he transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, a minimum field strength of 70 dB above one uV/m (dBu), or 3.16 mV/m, will be provided over the entire principal community to be served." The McDonoughs have provided no probative evidence that any proposed tower would violate local land use ordinances and our data provides no evidence that a tower in Healdsburg would violate any of our environmental rules, 47 C.F.R. § 1.1301 *et seq.* Accordingly, we will not rescind the allocation and the informal objection will be denied.

5. *Petition to Deny.* On May 31, 1991, local resident William J. Smith ("Smith") filed a petition to deny the applications of Deas, Dragonfly and Beckwith alleging that none of these applicants have reasonable assurance of site

[1] Dragonfly requested dismissal of its application by letter filed March 6, 1992. However, Dragonfly has not provided the appropriate statement of no consideration required by 47 C.F.R. § 73.3525.

[2] On June 5, 1991, Empire filed an opposition to RWC's petition for reconsideration.

availability.[3] Specifically, Smith contends that the Sonoma County Board of Zoning Adjustments will not grant these applicants permission to construct their proposed transmitting facilities because they have not made the requisite showing under the established guidelines for new tower sites in Sonoma County. Smith further supports his contentions by referring to a similar transmitter tower proposal by an unrelated broadcaster that was recently denied by the Sonoma County authorities.

6. In assessing the merits of Smith's petition to deny, a two step analysis is required. First, Section 309(d)(1) of the Communications Act, as amended, requires that the petition to deny contain allegations that, if true, are sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity. See 47 U.S.C. § 309 (d)(1) and (d)(2). If so, the Commission must examine all of the material before it to determine whether there is a substantial and material question of fact requiring resolution in a hearing. *See Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). In light of the circumstances discussed below, we conclude that the matters raised in the petition do not present a *prima facie* case or do not otherwise raise any substantial or material questions of fact that would require resolution in a hearing.

7. Where a broadcast applicant has reasonable assurance of site availability from the owner of the site, but requires zoning approval from a government entity to use that site, the applicant need not demonstrate such actual approval before the Commission grants a construction permit. *San Francisco Wireless Talking Machine Co.*, 47 RR 2d 889, 893 (1980). It appears that Deas, Dragonfly and Beckwith have reasonable assurance of site availability from the owners of the respective sites. Smith presents no clear evidence that demonstrates that the Sonoma County authorities would disapprove the necessary zoning use permit applications for construction of the proposed towers. Accordingly, Smith's petition to deny will be denied.[4]

8. *HBI.* An engineering study reveals a discrepancy in the calculation of the height above average terrain (HAAT) of HBI's proposed transmitter tower. Specifically, the HAAT as listed in Section V-B, Item (7)(b)(3) of HBI's application is 339 meters. However, the HAAT calculated by averaging the eight radials given in Section V-B, Question 19 is 169 meters. Both values fall within the maximum permitted pursuant to 47 C.F.R. § 73.211 for Class A facilities. In addition, we note that the predicted distances to the contours listed in Section V-B, Question 19 are underestimated. For example, the applicant indicates that the 60 dBu contour extends 23.1 kilometers (km) along the 45 true north radial whereas it would actually extend 30.4 km. However, even using HBI's underestimated contour, coverage of Healdsburg would be adequate. Since neither error renders the application unacceptable for filing, HBI will be given an opportunity to submit a curative amendment.

9. Contrary to HBI's showing, the proposed operation would be in violation of the prohibited contour overlap provisions of 47 C.F.R. § 73.215 with respect to the license for KKHI-FM, San Francisco, CA on Channel 239B (file no. BLH-850128LM). HBI's proposal will cause objectionable interference based on contour overlap to the protected 54 dBu contour of the first adjacent station KKHI-FM in an arc from approximately 122^0 T. to 188^0 T. from the applicant's site. HBI appears to have used incorrect ERP/HAAT values for KKHI-FM in its calculations. Pursuant to 47 C.F.R. § 73.215(b)(2)(ii), distances to KKHI-FM's protected and interfering contours must be based on the maximum effective radiated power (ERP) and HAAT for a Class B station (50 kW at 150 meters). We acknowledge that 47 C.F.R. § 73.215(b)(2)(ii) may be somewhat unclear. Therefore, pursuant to *Rochelle C. Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985), we conclude that this discrepancy does not warrant the return of the application. Therefore, HBI will be given one opportunity to submit a minor curative amendment with the presiding Administrative Law Judge after this Order is released. If the amendment fails to cure the defects, conflicts with a previously filed application, or for any other reason is unacceptable for filing, the amendment along with HBI's original application will be dismissed. On September 25, 1991, HBI submitted an untimely engineering amendment which fails to correct the deficiencies and therefore will be returned.[5]

10. *Beckwith.* In the amendment filed by Beckwith on April 29, 1991, Beckwith checked "yes" to Section II, Question 11(a), the alien ownership or control certification. Accordingly, an appropriate issue will be specified.

11. *RF Radiation.* Dragonfly, Beckwith, Desert Rock and Empire propose to locate their transmitting antennas on new towers. In addition, HBI proposes to side-mount its antenna on the existing tower of radio station KMGG(FM). Our engineering study indicates that these applicants have failed to address the matter of how they

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[3] Oppositions were filed by Beckwith on June 13, 1991, and by Deas and Dragonfly on June 21, 1991. Smith filed a reply to Beckwith's opposition on June 27, 1991 and replied to Dragonfly's opposition on July 2, 1991.

[4] On January 22, 1992, Smith filed a supplemental petition against Deas stating that the Sonoma County Grand Jury has recommended a full investigation into possible conflicts of interest on the part of M. Edgar Deas, a principal of applicant Deas, relating to his position as a member of the Healdsburg City Council. According to Smith, this information raises a character issue against Deas, and Deas should have supplemented its application under 47 C.F.R. § 1.65. Deas responded on February 12, 1992. Section 1.65(a) requires an applicant to promptly inform the Commission that "information furnished in the pending application is no longer substantially accurate and complete in all significant respects." 47 C.F.R. § 1.65(a). Deas is not required to report the grand jury's recommendations under Section 1.65 or the Commission's policy statement on character qualifications. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1190-91 (1985), *reconsidered in part*, 1 FCC Rcd 421 (1986), *as modified*, 5 FCC Rcd 3252 (1990), *reconsidered in part*, 6 FCC Rcd 3448 (1991). There have been no substantial changes in Deas' pending application as there have been no *adjudications* from any court of competent jurisdiction or governmental unit. Mr. Deas has not even been *indicted* on any charges.

[5] A study of the amendment pursuant to the requirements of 47 C.F.R. § 73.215 reveals that the tabulation for the proposed directional pattern does not agree with the sketched pattern. According to the sketch, the relative field strength at 130^0 T. is 0.4 while the tabulation gives a strength of 0.75 at 130^0 T. When 0.4 is used, there is no overlap with KKHI-FM. However, when 0.75 is used there is prohibited overlap. On October 18, 1991, Beckwith filed an opposition to HBI's petition for leave to amend. On October 30, 1991, HBI replied to Beckwith's opposition.

propose to resolve any RF exposure to workers on their respective towers. *See* 47 C.F.R. § 1.1307(b). Consequently, we are concerned that each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14,999 (April 12, 1986). *See also, Public Notice* entitled "Further Guidance for Broadcasters Regarding Radiofrequency Radiation and the Environment" (released January 24, 1986). Under the rules, an applicant must determine whether its proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. Section 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since Dragonfly, Beckwith, Desert Rock and Empire failed to specifically indicate how workers engaged in maintenance and repair would be protected from exposure to levels exceeding the ANSI guidelines, each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. *See generally,* OST Bulletin No. 65 (October, 1985) entitled "Evaluating Compliance With FCC-Specified Guidelines For Human Exposure to Radiofrequency Radiation," at 28. Therefore, Dragonfly, HBI, Beckwith, Desert Rock, and Empire will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.,* 71 FCC 2d 2289 (1979), *recon. denied sub nom. Old Pueblo Broadcasting Corp.,* 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Environmental Assessments, that the applicants' proposals will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted and the presiding judge shall thereafter not consider the environmental effects of the proposals. *See* 47 C.F.R. § 1.1308(d).

12. *EEO.* The Commission requires that if there are five or more full time station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Empire has filed such a statement, it is deficient. Empire failed to list a hispanic organization. Hispanics make up 6.7% of the labor force. Accordingly, Empire will be required to file amended EEO programs with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

13. *Other Matters.* The applicants below amended their applications on the dates shown. All of the amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Deas	February 6, 1992
Dragonfly	June 4, 1991
HBI	January 6, 1992; April 6, 1992

14. Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

16. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Beckwith is owned or controlled by aliens or their representatives, in violation of Section 310(b) of the Communications Act of 1934, as amended.

2. If a final environmental impact statement is issued with respect to HBI, Dragonfly, Beckwith, Desert Rock and Empire in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

17. IT IS FURTHER ORDERED, That the petition for reconsideration filed by RWC IS HEREBY DISMISSED.

18. IT IS FURTHER ORDERED, That the informal objection filed by John and Barbara McDonough IS HEREBY DENIED.

19. IT IS FURTHER ORDERED, That the petition to deny filed by William J. Smith against Deas, Dragonfly, and Beckwith IS HEREBY DENIED.

20. IT IS FURTHER ORDERED, That, in accordance with paragraphs 8 and 9 hereinabove, HBI shall submit an amendment to cure the antenna height and contour overlap deficiencies to the presiding Administrative Law Judge within 30 days after the release of this Order.

21. IT IS FURTHER ORDERED, That, in accordance with paragraph 11 hereinabove, Dragonfly, HBI, Beckwith, Desert Rock and Empire shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days after the release of this Order, with a copy to the Chief, Audio Services Division.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Empire shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

23. IT IS FURTHER ORDERED, That the late amendments filed by Deas and Dragonfly ARE ACCEPTED to the extent indicated, the September 25, 1991 amendment filed by HBI IS RETURNED, and HBI's other two late amendments ARE ACCEPTED to the extent indicated herein.

24. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order. Pursuant to Section 1.325(c) of the Commission's Rules, within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules), which must also be filed with the presiding officer. Failure to so serve the required materials may constitute a failure to prosecute, resulting in dismissal of the application. *See generally Proposals to Reform the Commission's Comparative Hearing Process* (Report and Order in Gen. Doc. 90-264), 6 FCC Rcd 157, 160-1, 166, 168 (1990). *Erratum*, 6 FCC Rcd 3472 (1991), *recon. granted in part*, 6 FCC Rcd 3403 (1991).

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-17

In re Applications of

ANNETTE B. GODWIN	File No. BPH-891129MF
FERNANDINA BEACH FM LIMITED PARTNERSHIP	File No. BPH-891129MH
MARTIN A. SECREST	File No. BPH-891130MH
FIRST COAST BROADCASTING, INC.	File No. BPH-891130ML
EMILY METCALF	File No. BPH-891130MO
MARDIROSSIAN BROADCASTING, INC.	File No. BPH-891130MP
BROOMECO BROADCASTING, INC.	File No. BPH-891130MR
ROBERT G. KERRIGAN and GEORGE W. ESTESS D/B/A KERRESS BROADCASTING	File No. BPH-891130MJ (Reinstated)

For Construction Permit for a New FM Station on Channel 287A in Fernandina Beach, FL

HEARING DESIGNATION ORDER

Adopted: May 6, 1992; Released: May 20, 1992

By the Chief, Audio Services Division

1. The Commission has before it a petition for reconsideration filed on March 15, 1991, by Robert G. Kerrigan and George W. Estess d/b/a Kerress Broadcasting (Kerress), an applicant for a new FM broadcast station at Fernandina Beach, Florida. Kerress seeks reinstatement of the above-captioned application which was dismissed by delegated authority of the Chief, Audio Services Division in the Fernandina Beach *Hearing Designation Order*, 6 FCC Rcd 899 (1991) (*HDO*).

2. The Kerress application was dismissed in the *HDO* as inadvertently accepted for filing after engineering review revealed that it failed to meet the spacing requirements of 47 C.F.R. Section 73.207, with respect to the reference coordinates for the first-adjacent channel (286C2) allotment for Blackshear, Georgia, specified in the *Report and Order* in MM Docket 86-294, 4 FCC Rcd 1608 (1989). The *HDO* stated that, because the Blackshear allotment was effective seven months prior to the filing of the Kerress application, Section 73.207 of the Commission's Rules required a minimum distance of 106 kilometers between the Blackshear reference coordinates and the site proposed by Kerress. The Kerress application, however, proposed only 105.1 kilometers spacing between these two points.

3. In its petition for reconsideration, Kerress argues that the staff erred by applying subsection 73.208(a)(1), which deals with rulemaking proceedings, rather than subsection 73.208(b) which deals with licensing proceedings, in concluding that its application was short spaced. Subsection 73.208(a)(1) requires applicants in rulemaking proceedings to protect reference coordinates designated by the FCC. Subsection 73.208(b), which applies to licensing proceedings, on the other hand, contains no such provision, but does require applicants to protect a designated point in the National Atlas. Because its application was dismissed for failure to protect the reference coordinates for Blackshear designated by the FCC, Kerress contends, the dismissal was clear error. Moreover, Kerress contends that it has calculated the distance between the National Atlas point for Blackshear and the transmitter sites proposed by each of the applicants for Fernandina Beach and that not one of them, including its own, meets the minimum spacing requirements. Consequently, Kerress contends, the Commission must either rescind its designation order and dismiss all of the Fernandina Beach applications or it must issue an order waiving spacing limitations and reinstate the Kerress application.

4. The Commission's rules clearly require that domestic allotments and assignments must be separated from each other by set distances, depending on the particular classes and channels of the allotments and assignments involved. See 47 CFR § 73.207(b)(1). Such calculations are made based on geographic coordinates. This case involves a question as to what geographic coordinates should be used when making those calculations. The Commission's rules provide detailed guidance concerning this matter. Specifically, Section 73.208 provides, in pertinent part:

> (a)(1) The following reference points must be used to determine distance separation requirements when petitions to amend the Table of Allotments are considered:
>
> First, transmitter sites if authorized;
>
> Second, reference coordinates designated by the FCC;
>
> Third, coordinates listed in the United States Department of Interior publication entitled *Index to the National Atlas of the United States of America*....
>
> (The community's reference points for which the petition is submitted will normally be the coordinates listed in the above publication.)
>
> (2) When the distance between communities is calculated using community reference points and it does not meet the minimum separation requirements..., the channel may still be allotted if a transmitter site is available that would meet the minimum separation requirements and still permit the proposed station to meet the [Commission's principal community coverage requirements].

(b) Station separations in licensing proceedings shall be determined by the distance between the coordinates of the proposed transmitter site in one community and

(1) The coordinates of an authorized transmitter site for the pertinent channel in the other community; or, where such transmitter site is not available for use as a reference point,

(2) The coordinates of the other community as listed in the publication listed in paragraph (a) of this section....

This language from subsections (a) and (b) provides, by its express terms, for similar treatment of petitions for rule making to amend the table of allotments and applications for stations licenses or permits, except that subsection (b) does not expressly provide for the use of "coordinates designated by the FCC" to compute distance separations in licensing proceedings.

5. As Kerress correctly points out, the coordinates for the Blackshear allotment contained in the *Report and Order* allotting the channel were "coordinates designated by the FCC," and not "the coordinates of an authorized transmitter site," *i.e.*, a transmitter site specified in a license or permit. Thus, Section 73.208, by its express terms, does not require, in licensing proceedings such as this one, that the Commission consider coordinates of the type specified for the Blackshear allotment. Based on the express terms of Section 73.208(b), the reference coordinates for the Blackshear allotment are the coordinates for Blackshear listed in the *National Atlas*. Were we to strictly apply this rule provision, we would, as Kerress suggests, dismiss each of the applications in this case, because each, including Kerress' application, is short spaced to the community coordinates for Blackshear.

6. It has been our consistent interpretation of the Rules that applicants are required to protect reference coordinates for allotments specified by the Commission. Absent this interpretation, we would be protecting irrelevant coordinates. For example, in this case, the Blackshear allotment's community reference coordinates are substantially short spaced to licensed Station WIFO, Channel 288A, Jesup, Georgia. Section 208(b), however, does not explicitly reflect the requirement that reference coordinates specified by the Commission must be protected, an oversight we intend to correct as soon as possible. Under this circumstance, where an applicant, such as Kerress, has followed the literal requirements of our rule, the appropriate course of action is to accept its application as tenderable. In this regard, we are mindful that the less forgiving our standards are, the more precisely stated they must be. *Salzer v. FCC*, 778 F.2d 869, 875 (D.C. Cir. 1985). Also, under these circumstances, where each of the applicants, with the exception of Kerress, is fully spaced with regard to the reference point specified by the Commission for Blackshear, we will not require them to amend their applications to protect the National Atlas coordinates for Blackshear. We will, however, in order to insure that each of the applicants in this proceeding are fully spaced and can be granted, require that Kerress amend its application to protect the Commission specified coordinates for Blackshear.

7. Accordingly, IT IS ORDERED, That the petition for reconsideration filed by Kerress IS GRANTED, the Kerress application IS REINSTATED and pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Kerress IS DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be determined in a subsequent order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applicants should be granted, if any.

8. IT IS FURTHER ORDERED, That in accordance with paragraph 6, *supra*, Kerress shall file an amendment with the presiding Administrative Law Judge witnin thirty days from the release of this Order.

9. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Additionally, a copy of each amendment filed in this proceeding subsequent to the adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, Kerress shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That Kerress, concurrent with the filing of its notice of appearance, shall make payment of the hearing fee as required by Section 1.1104 of the Rules.

12. IT IS FURTHER ORDERED. That Kerress shall, pursuant to Section 311(a)(2) of the Communications of 1934, as amended, and Sections 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-114

In re Applications of

ROBERT B. TAYLOR File No. BRH-880926UJ

For Renewal of License for
Station WTRU(FM) Jupiter, Florida

JUPITER BROADCASTING CORPORATION File No. BPH-890103MD

For Construction Permit for a new
FM Station in Jupiter, Florida

HEARING DESIGNATION ORDER

Adopted: May 11, 1992; Released: May 20, 1992

By the Chief, Audio Services Division, Mass Media Bureau:

1. The Commission, by the Chief, Audio Services Division, Mass Media Bureau, acting pursuant to delegated authority, has before it for consideration: (a) the above captioned application for renewal of license of WTRU(FM) (formerly WKSY(FM)) Jupiter, Florida, filed September 26, 1988, by Robert B. Taylor (Taylor);[1] [2] (b) a petition to deny the WKSY(FM) (now WTRU(FM)) license renewal application, filed January 3, 1989, by Jose Oaks (Oaks), as supplemented on January 9, 1989; (c) an opposition to petition to deny filed January 27, 1989, by Taylor; (d) a motion to strike the opposition to petition to deny filed March 22, 1989, by Oaks; (e) the above captioned mutually exclusive application for a construction permit for a new FM broadcast station on Channel 258A at Jupiter, Florida, filed January 3, 1989, by Jupiter Broadcasting Corporation (Jupiter); (f) a petition to deny the Jupiter application filed July 24, 1989, by Taylor; (g) an opposition to petition to deny filed August 25, 1989, by Jupiter;[3] and (h) petitions for leave to amend filed by Jupiter.

Taylor's WTRU(FM) Application

a. Jose Oaks' Petition to Deny

2. On January 3, 1989, Jose Oaks filed a petition to deny Taylor's renewal application for Station WTRU(FM). To demonstrate standing, Oaks claims "to have a place of business" and to "seasonally resid[e]" in Boca Raton, Florida.[4] However, Boca Raton, Florida, is not within the station's service area, nor has Oaks alleged that he listens to the station. Accordingly Oaks has failed to establish his standing as a party in interest as required by § 309(d)(1) of the Communications Act of 1934, as amended. See, *NAB Petition for Rulemaking*, 82 FCC 2d 89, 98 (1980). Thus, Oaks' pleading must be dismissed as a petition to deny.

3. However, having found Oaks' petition to be defective, we shall consider it as an informal objection, pursuant to § 73.3587 of the Commission's Rules. Nevertheless, even an informal objection must meet certain requirements. We conclude that Oaks' pleading lacks adequate specificity to warrant further Commission inquiry. Oaks alleges that the licensee violated § 73.1216 of the Commission's Rules, which states:

> A licensee that broadcasts or advertises information about a contest it conducts shall fully and accurately disclose the material terms of the contest, and shall conduct the contest substantially as announced or advertised. No contest description shall be false, misleading or deceptive with respect to any material term.

In support, Oaks furnishes uncertified copies of three complaints filed against the licensee in March and April, 1987, in the Circuit Court of Palm Beach County. Through their attorney, the three complainants allege breach of contract, fraud and violation of Florida State law with respect to the licensee's conduct of contests during October and November, 1986. However, Oaks has failed to provide any sworn statements or affidavits of the complainants or any other person having personal knowledge of the facts, or attesting to the truthfulness of the charges raised in the complaints. Thus, the only information which has been furnished are the hearsay representations of the attorney, which, standing alone, are insufficient to raise a substantial and material question of fact. *Cf. Itawamba County Broadcasting Co. Inc.*, 45 FCC 2d 871, 872 (Rev. Bd. 1974); *Eastern Broadcasting Corp.*, 29 FCC 2d 472, 474-75 (Rev. Bd. 1971); *Martin Lake Broadcasting Co.*, 28 FCC 2d 457, 459 (Rev. Bd. 1971). Moreover, Oaks acknowledges that the cases may have been settled. Accordingly, even when considered as an informal objection, Oaks' request must be denied.[5]

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[1] The renewal application was filed for call letters WKSY(FM) by U.S. Three Broadcasting Corp. On December 27, 1988, the Chief, FM Branch, Audio Services Division, Mass Media Bureau, approved the assignment of the station from U.S. Three Broadcasting Corp. to Robert B. Taylor. All of the stock of U.S. Three was held by R & R Broadcasting Corporation of which Robert B. Taylor was the sole shareholder. For tax reasons, Mr. Taylor determined to dissolve both R & R Broadcasting and U.S. Three and to be the licensee as an individual. Subsequent to the assignment to Taylor, the call letters were changed from WKSY(FM) to WTRU(FM).

[2] By letter dated April 15, 1992, the Managing Director denied Jupiter Broadcasting Corporation's petition to dismiss the renewal application of WTRU(FM) and granted Taylor's request for waiver of the hearing fee deadline.

[3] On July 28, 1989, Jupiter filed a motion for extension of time, requesting until August 25, 1989, to respond to Taylor's petition to deny.

[4] Oaks' "Statement," filed January 9, 1989.

[5] In light of this action, the licensee's January 27, 1989, opposition to petition to deny and Oaks' March 22, 1989, motion to strike are dismissed as moot.

b. WTRU(FM)'s Silence

4. On April 1, 1987, WTRU(FM) suspended operations. Commission authority to remain silent was extended through April 1, 1989. The station then went back on the air until it again suspended operations with authority on November 20, 1989, pursuant to § 73.1740(a)(4) of the Commission's Rules. It then resumed operations on December 20, 1989. WTRU(FM)'s silence may be considered under the licensee's "renewal expectancy."

Taylor's Petition to Deny Jupiter's Application

5. On July 24, 1989, Taylor, licensee of WTRU(FM), filed an uncertified petition to deny Jupiter's application. Jupiter filed an opposition on August 25, 1989. The petition is, in essence, a predesignation petition to specify issues, which is no longer permitted. Accordingly, the petition and opposition thereto will be dismissed. *Revised Processing of Broadcast Applications*, 72 FCC 2d 202, 214-5 (1979). These issues can be raised before the presiding Administrative Law Judge as may be appropriate.

Areas and Populations

6. The area and population data in the existing files for Station WTRU(FM) are not current. Therefore, there may be a significant difference in the size of the area and population proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

Late-filed Amendments/§ 1.65

7. Jupiter petitioned for leave to amend its application on July 28, 1989, September 1, 1989, May 2, 1990, May 1, 1991, and June 13, 1991, all after the amendment of right cut off dates. Under § 1.65 of the Commission's Rules, the amendments are accepted for filing. However, Jupiter may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience and necessity. Therefore, the mutually exclusive applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, that pursuant to § 309(e) of the Communications Act of 1934, as amended, and § 1.227 of the Commission's Rules, the applications are DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(1) To determine which of the above captioned applications for an FM authorization in Jupiter, Florida would, on a comparative basis, best serve the public interest;

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which, if either, of the applications should be granted.

10. IT IS FURTHER ORDERED, That the Petition to Deny filed by Jose Oaks on January 3, 1989, IS DISMISSED, and when treated as an Informal Objection, IS DENIED.

11. IT IS FURTHER ORDERED, That Taylor's January 27, 1989, Opposition to Petition to Deny and Oaks' March 22, 1989, Motion to Strike, ARE DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That Taylor's July 24, 1989, Petition to Deny Jupiter's FM application and Jupiter's August 25, 1989, Opposition, ARE DISMISSED.

13. IT IS FURTHER ORDERED, That the Petitions for Leave to Amend filed by Jupiter on July 28, 1989, September 1, 1989, May 2, 1990, May 1, 1991, and June 13, 1991, ARE GRANTED to the extent indicated herein.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants shall, pursuant to § 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 12, 1992

COMMENTS INVITED ON NORTHERN CALIFORNIA AREA PUBLIC SAFETY PLAN AMENDMENT

On November 20, 1990, the Commission accepted the Public Safety Plan for the Northern California area (Region 6). On March 16, 1992, Region 6 submitted a proposed amendment to its plan that would revise the current channel allotments and add criteria to ensure appropriate use of vacated channels. Because the proposed amendment is a major change to the Region 6 plan, the Commission is soliciting comments from the public before taking action. (See Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 57.)

Interested parties may file comments to the proposed amendment on or before **June 17, 1992** and reply comments on or before **July 2, 1992.** Commenters should send an original and five copies of comments to the Secretary, Federal Communications Commission, Washington, D.C. 20554 and should clearly identify them as submissions to **Gen. Docket 90-287 Northern California Area-Public Safety Region 6.**

Questions regarding this public notice may be directed to Betty Woolford, Private Radio Bureau, (202) 632-6497 or Ray LaForge, Office of Engineering and Technology, (202) 653-8112.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-298

In re Applications of

LUCINDA FELICIA PAULOS	File No. BPH-880518MB
BODEGA COMMUNICATIONS, INC.	File No. BPH-880519MD
JOHN A. CAROLLO, JR.	File No. BPH-880519MX
MANZANITA MEDIA, INC.	File No. BPH-880519NR

For Construction Permit for a
New FM Station on Channel 229A
in Sebastopol, California

Appearances

Peter A. Casciato, Esq. on behalf of Lucinda Felicia Paulos; *Paul A. Zevnik, Esq.* on behalf of Bodega Communications, Inc.; *Paul C. Besozzi, Esq.* and *Stephen Diaz Gavin, Esq.*, on behalf of John A. Carollo, Jr.; *John D. Pellegrin, Esq.* on behalf of Manzanita Media, Inc.; *Charles Dziedzic, Esq.* and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE RICHARD L. SIPPEL

Issued: May 15, 1992; Released: May 26, 1992

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of four applicants:[1] Lucinda Felicia Paulos ("Paulos"), Bodega Communications, Inc. ("BCI"), John A. Carollo, Jr. ("Carollo") and Manzanita Media, Inc. ("MMI"). These four applicants are competing for the award of a Commission permit to construct a new FM Station on Channel 229A at Sebastopol, California.

2. The *Hearing Designation Order* ("*HDO*") DA 90-758, released July 2, 1990, reported at 5 F.C.C. Rcd 3927 (MM Bur. 1991) and published at 55 Fed. Reg. 28098 (released July 9, 1990) sets the standard comparative issues for adjudication as follows:

> (a) To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> (b) To determine, in light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

The party applicants have the burdens of proving their proposals by a preponderance of the evidence. *Cuban-American, Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). *Knoxville Broadcasting Corp.*, 103 F.C.C. 2d 669, 687 (Review Bd 1986). *See also Steadman* v. *SEC*, 450 U.S. 91 (1981).

3. In the course of this proceeding, the following issues were added by the Presiding Judge against Paulos:

> (c) To determine whether at the time of certification Lucinda Paulos had reasonable assurance of the funds necessary to construct an FM broadcast station at Sebastopol, California and to operate it for three months without revenues.
>
> (d) To determine whether Lucinda Paulos is an undisclosed principal in Stations KVIB and KHEI (Maui, Hawaii) and Station KAOI, Wailuku, Hawaii and, if so, whether she concealed such information from the Commission and whether she is qualified to receive a Commission license.

Memorandum Opinion and Order, FCC 91M-769, released February 27, 1991.

4. Hearings in Phase I were held from June 25 to June 28, 1991. *Order* FCC 91M-2041, released July 2, 1991. The parties were directed to file first phase Proposed Findings of Fact And Conclusions Of Law ("PFC") on August 16, 1991, and to file Reply Proposed Findings Of Fact And Conclusions Of Law ("RPFC") on September 4, 1991. (*Id.*)

5. The parties offered into evidence a joint engineering exhibit that was received on June 25, 1991. (Tr. 90-91.) The parties have stipulated as to each party's coverage and that there are no significant differences in the areas or populations to be served by the four applicants in their respective engineering proposals. (Jt. Engineering Exh. 1.)

6. Paulos had filed on June 21, 1991, a Petition To Enlarge Issues against former applicant Beth Knight ("Knight"). The pleading cycle was concluded with Paulos' Reply filed on August 12, 1991. The Presiding Judge required the parties to narrow the issues of fact for resolution by summary decision. *Order* FCC 91M-2855, released September 17, 1991. A prehearing conference was held on October 3, 1991 (FCC 91M-2955), which was reset for October 8, 1991 (FCC 91M-2984). After hearing the views of all parties, a discovery schedule was set and Knight was ordered to file her Motion for Summary Decision on January 7, 1992. *Order* FCC 91M-3061, released October 10, 1991. A contingent trial date was set for February 26, 1992, in the event that Knight should fail to file her motion. *Id.*

7. The Presiding Judge added issues against Knight to determine whether she was financially qualified at certification and whether she was continuously financially qualified since her certification. *See Memorandum Opinion and Order*, FCC 91M-3072, released October 11, 1991.[2] Knight's request for leave to file an interlocutory appeal was denied by the Presiding Judge. *Memorandum Opinion and Order*, FCC 91M-3529, released November 12, 1991. Then Knight filed a Statement For the Record on November 13, 1991, announcing that she would not attempt to meet the issue with evidence because she had not budgeted for litigating added issues. Knight's application was dismissed by the Presiding Judge for failing to prosecute her application and for being financially disqualified under the added issues. *Memorandum Opinion and Order*, FCC 91M-

3465, released December 19, 1991. The Review Board affirmed Knight's dismissal for her failure to comply with the Presiding Judge's discovery and procedural dates. *Beth Knight, et al.*, 7 F.C.C. Rcd 1889 (Review Bd 1992), Commission appeal filed April 1, 1992.[3]

FINDINGS OF FACT

8. Since the applications are mutually exclusive, a consolidated factual hearing was conducted on all issues wherein the parties presented evidence and conducted cross-examination. *Ashbacker Radio Corp.* v. *F.C.C.*, 325 U.S. 327, 333 (1945); *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202 (1956) (parties have right to present oral and documentary evidence and to conduct cross-examination).

Standard Comparative Issue

9. The matters for determination under the standard comparative issue are which of the integration proposals would, on a comparative basis, best serve the public interest [*HDO* at Para. 7(2)]; and, in light of the evidence adduced relating to that issue, which of the applications should be granted [*HDO* at Para. 7(3)].[4] *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 394 (1965).

Media Diversification

10. None of the four applicants owns an attributable interest in a means of mass communications. (Paulos Exh. 2; BCI Exhs 1, 12; Carollo Exh. 2; MMI Exhs. 1-4.) Therefore, no party applicant receives a diversification credit or demerit. *Policy Statement On Comparative Broadcast Hearings, supra* at 394-95.

Comparative Coverage

11. The stipulation is based on empirical data which constitutes substantial evidence. (Jt. Engineering Exh. 1.) There is no significant coverage difference found in the areas and populations proposed to be covered and therefore no party applicant receives a diversification credit or demerit. *Id.*

Best Practicable Service

Lucinda Felicia Paulos

Proposed Integration

12. Paulos has applied as an individual. She is a caucasian female. She proposed to work full-time as general manager of the station if she receives the grant. In that capacity she would supervise all station functions and departments. She will hire and fire employees and she will set programming and commercial policies. (Paulos Exh. 1.)

13. The evidence establishes that Paulos prepared her application in consultation with her counsel. (Paulos Exh. 1.) She paid Commission fees and engineering and legal expenses from personal funds. (*Id.*) She independently selected her engineer and her antenna site. She is the sole signatory on her checking account. (*Id.*) There is no evidence that Paulos was assisted by any other person in the prosecution of her application.[5]

Broadcasting Experience

14. At the time of the hearing, Paulos was employed by Visionary Related Entertainment, Inc. ("referred to as "Visionary" and "VRE-I") at Station KAOI(FM) in Maui, Hawaii. KAOI also simulcasts on KAOI-AM. (Paulos Exh. 1 at 2.) She will leave that employment if she receives the Sebastopol grant. (*Id.*) She has been with KAOI since October 1, 1990, where she serves in the capacity of an on-air personality and as a sales executive. (Paulos Exh. 1 at 8.)

15. From January to September, 1990, Paulos was employed as development director at Station KRCB(TV) at Robert Park, Cotatic, California. Also, from March to September 1990, she was a volunteer at CATV radio Station KAFE 96 at Santa Rosa, California. (Paulos Exh. 1 at 8.) From July 1987 through June 1988, she was an on-air personality and sales and promotions person with Visionary at Station KVRE(FM) and at Station KWFN(FM) at Santa Rosa, California. (*Id.*)

16. From September 1986 through February 1987, Paulos was promotions director and she was involved in sales at Station (KAOI(FM) in Maui. (Paulos Exh. 1 at 8.) From January to July 1986, she was program director for Station KZAM(FM)/(AM) in Springfield, Oregon. (*Id.*) From approximately January, 1979 through July, 1986, she was program director, music and promotions director, on-air personality and involved in sales at KVRE(FM)/KWFN(AM), Santa Rosa, CA. (*Id.*) In 1978, she was assistant music director at KROQ, Los Angeles, CA. (*Id.*) From 1975 to 1978, she was public affairs director at KWST, Los Angeles, CA. (*Id.*) In 1974, she was assistant program director at KMET, Los Angeles, CA. (*Id.*) In 1973-74, she was public affairs director at KROQ, Los Angeles, CA. (*Id.*)

Local Residence and Civic Activities

17. Paulos resided in Forestville, California from 1979 to 1984 and in Santa Rosa, California from 1984 to September 1986, and from February 1987 until September 1990. Both residences were within the 1.0 mV/m contour of her proposed signal coverage. (Paulos Exh. 1 at 3.) Paulos has testified that she resided in Maui, Hawaii since October 1, 1991, where she is currently employed. (*See* Para. 14, *supra.*) If she wins the grant, Paulos will return to Santa Rosa, California.[6]

18. Paulos has been active in community affairs in Sonoma County as follows. From 1979 to 1986, Paulos was a guest lecturer on broadcasting at the Santa Rosa Junior College. (Paulos, Tr. 369-70, 373-74, 377, 438.) In 1984, Paulos served for six months on the board of directors of the Sonoma County YWCA. She attended four board meetings and weekly committee meetings concerned with a special project. (Paulos Exh. 1, Att. B, Pp. 66-70; Paulos, Tr. 451-52.)[7]

19. In 1987-88, Paulos served as a volunteer for the non-profit Luther Burbank Performing Arts Center for which she served as coordinator for its festival called "Celebrate Sonoma." (Paulos, Tr. 801-805, 864.) She also performed volunteer services in 1989 for the Hospital Chaplaincy.[8] (*Id.*)

20. With the exception of the above factual findings on Paulos' civic involvement, the Presiding Judge rejected certain cryptic evidence of civic involvement proffered in her hearing exhibit. (Paulos Exh. 1 at 3-7.) The reasons for the exclusion, which was prompted by a motion to strike made by former applicant Knight's attorney in open court, are set forth in a bench ruling. (Tr. 432-34.)[9]

Auxiliary Power

21. Paulos pledges to install auxiliary generators at both her proposed studio and transmitter site locations. (Paulos Exh. 3.)

Basic Qualifying Issues

Financial Certification

22. Paulos must prove by a preponderance of the evidence that when she certified to her financial qualifications on May 18, 1988, she had a reasonable assurance of necessary funds and that she is not an undisclosed principal in stations KVIB and KHEI at Maui, Hawaii, or station KAOI, Wailuka, Hawaii (collectively the "Hawaiian stations"), and whether she concealed that information from the Commission (FCC 91M-769).

Cost Estimates

23. The primary concern with Paulos' certification was the dearth of data on costs. The estimate of costs that she relied on at certification is reflected in an exhibit which disclosed the following:

Construction Costs and 1st Quarter Operation

Construction:

Transmitter Site:	$30,000	
Studio Site:	$40,000	$ 70,000

Operation Costs First Quarter:

Technical (above construction)	$4,000	
Programming	25,000	
Sales	12,000	
General & Administrative	12,000	$ 53,000
	Total:	$123,000

(Paulos Exh. 4, Att. A) As is self-evident, the dollar amounts are conclusory. There are no line items given that would substantiate the general costs listed by Paulos. Also, the written testimony of Paulos in support of her evidence on costs reflects that the dollar amounts were the costs that she relied upon when she certified. (Paulos Exh. 4 at 1.) But the testimony does not establish that these cost estimates existed in written form until their disclosure was made in discovery. (*Id.*)[10] Since there was no evidence establishing written cost estimates prior to certification and there were no copies of handwritten notes or calculations, it is found that Paulos has not proven that she constructed a formal estimate of costs for construction and operation before she certified on Form 301.

24. In addition, Paulos did not base her cost estimates on conversations with engineers or equipment salespersons or broadcasters who had first-hand knowledge of costs. Instead, Paulos relied in general on her "past discussions and experience in the broadcasting business for over 15 years." (Paulos PFC at 11.) To illustrate, she argues that she had relied on:

> - - - the set-up, construction and operations of the stations owned and licensed as follows: (1) Visionary Radio Euphonics, Inc. ("VRE"), KVRE-FM/KWFN-AM in Santa Rosa, CA; (2) Visionary Radio Euphonics of Oregon, Inc. ("VRE-O"), KZAM-AM/FM licensed to Creswell/Springfield/ Eugene, OR; (3) VRE of Lake County, Inc. ("VRE-LC"), KXBX(FM)/KWTR(AM) licensed to Lakeport, CA; and (4) Mendocino Coast Wireless Company, Inc. ("MCWC"), KOZT(FM) licensed to Ft. Bragg, CA. Paulos Exhibit 4 at 1. Ms. Paulos was a shareholder or principal and officer and director in each of these entities, during the time of station ownership and until the consummation of the sale of the stations to Keffco, Inc. on July 1, 1988 (approximately two months after filing her Sebastopol application), and their subsequent dissolution by the end of 1988. *Id.*

(Paulos PFC at 11.) That evidence only establishes that Paulos was a principal in four licensees of broadcast stations. That evidence does not establish that Paulos was directly involved in business dealings with construction companies, suppliers, architects, mechanics, bankers and other persons who would have hands-on responsibility for costing out a project.

25. Paulos was a shareholder, officer and/or director of each of the four licensees. But she never held a position of financial officer. Her responsibilities were confined to programming, promotions and the sale of advertising. (Paulos Exh. 1 at 7-9, Paulos, Tr. 495, 520-21.)[11] She never negotiated price with equipment dealers, nor paid for equipment, nor wrote any checks. She relies solely on having general sufficient familiarity with costs by being present when studio sites were built and by reviewing quarterly profit and loss statements. (Paulos Exh. 4 at 7; Paulos, Tr. 495-96; 503.)

26. Paulos admits that she has no expertise in station construction, operation and engineering. (Paulos PFC at 15.) Yet she claims to be "knowledgeable and experienced" in radio station start-up and operating costs. (*Id.*) Without reference to a detailed cost estimate that was proven to have been in existence when she certified in 1988, Paulos testified without notes to specific cost line-items. For example, without benefit of notes or a document, she testified that used equipment would be used where possible and she made a specific reference to a 1KW transmitter of the type that had been used in Creswell, Oregon at Station KZAM(FM) that was built in 1984. (Paulos, Tr. 500, 574; Paulos Exh. 4 at 2.) She testified in her written testimony that she had worked at KZAM as program director from January 1986 to July 1987, and that she had gained familiarity with the costs of transmitter site through an occasion she had to review the station's business files. But no evidence was offered of any records or contemporaneous notes. Nor was there a corroborating witness proffered for testimony to substantiate Paulos' account of her involvement with past costs.

27. On cross-examination Paulos testified that she was familiar with costs of a used Wilkinson transmitter and a used Jampro antenna that were employed at Station KZAM(FM). Those costs were between $7,500 and $10,000. (Paulos, Tr. 491-93, 511, 514, 517.) Paulos' explanation as to source was her presence at meetings in the mid-1980s and her recollection that she had scouted out transmitter sites for KZAM and that she had spoken with unidentified people who were going to construct the station. (Paulos, Tr. 500, 502; Paulos PFC at 13.) But again there were no documents or corroborating witnesses to support this testimony.

28. Specifically, Paulos relies on what she contends to be her first-hand experience in the construction and operation of four stations during the period 1979-1988: KVRE-FM/KWFN-AM in Santa Rosa, CA; KZAM-AM/FM in Creswell, OR; KXBX-FM/KWTR-AM in Lakeport, CA; and KOZT-FM in Fort Bragg, CA. (Paulos Exh. 4 at 2; Knight Exh. 8.) The credibility of Paulos' testimonial recollections are significant in this case because, in adding these issues, the Presiding Judge had noted that there was no indication that Paulos was involved in the process of determining costs or that she had worked with someone knowledgeable about costs before she had certified to her financial ability. *Memorandum Opinion and Order*, FCC 91M-769, *supra*.

29. Paulos testified in her written testimony that she had "general discussions" about construction costs with her engineer, Mel Freedman, ("Freedman"), and with another engineer, Milan Leggett ("Leggett"), about costs of an unrelated station. (Paulos Exh. 4 at 4.) Both discussions were alleged to have taken place before she certified. (*Id.*) Both were sought for cross-examination after the exchange of written testimony and neither of those engineers was produced as a witness.[12] The Presiding Judge cautioned Paulos in advance of trial that a failure to produce them for cross-examination could result in an adverse inference being drawn. *See Order* FCC 91M-1856, released June 11, 1991. In cross-examination, Paulos admitted that the motive for making reference to Freedman and Leggett in her testimony was in part to show that she had spoken with someone knowledgeable about costs. (Paulos, Tr. 541.) But she concluded that her years of experience were relied on much more than her conversations with Freedman and Leggett. (*Id.*) For example,

> Q. You didn't discuss with Mr. Leggett any specific cost estimates [about] the transmitter antenna?
>
> A. No, it was very, very brief and quick.

(Paulos, Tr. 541.) In view of this unwillingness of Ms. Paulos to testify that she substantially relied on these engineers for advice on costs before she certified, she will not be credited with reliance on those knowledgeable experts. Furthermore, the adverse inference is drawn against Paulos for failing to produce Freedman and Leggett for cross-examination.[13]

30. Paulos testified that her written estimates in Attachment A to Exhibit 4 were based on acquiring used equipment. (Paulos Exh. 4 at 1.) But she admitted that when she made her certification on Form 301, she had made no attempt to determine the availability and pricing of used transmitter equipment. (Paulos, Tr. 510.) Her testimony was that she had relied on specific costs that she had acquired while employed in programming and sales positions in Santa Rosa, Creswell, Lakeport and Fort Bragg during the period 1979-1988. (Paulos Exh. 4 at 1-2.) Because of the failure to produce contemporaneous notes, worksheets or other reliable corroborating evidence, the inconsistencies in her abilities to recall, and her motivation to appear to have specific recollection (she had no contemporaneous notes to corroborate), Paulos' testimony on specific costs is not reliable and therefore it is not accepted. There are specific intrinsic indicia of unreliability that warrant rejecting Paulos' testimony. For example, on trips to Creswell with John Detz, it was Detz who handled negotiations. She only accompanied Detz. (Paulos, Tr. 503, 734.) She testified that she was not a person who was concerned with "financial details." (Paulos, Tr. 730-31, 829, 842.) Creswell was the most significant cost reference for Paulos yet she could not recall the wattage of the transmitter at Creswell (Paulos, Tr. 512-13) or the number of bays in the antennas. (Paulos, Tr. 515-16.) Nor was Paulos' list complete. She omitted costs of a building to house the transmitter and related equipment. Paulos also submitted that her recollection had been adversely affected by the passage of time. (Paulos, Tr. 554-56.)

Availability of Liquid Assets

31. There also are issues of fact as to whether Paulos had sufficient liquid assets to meet her estimated costs of $123,000. Paulos has shown that she was a shareholder of Visionary and affiliated companies. Two months prior to certification, contracts of sale were signed for a total sales price of $5.4 million. An assignment application was filed with the Commission one month prior to certification. Paulos expected and had reason to believe that her interest in the sales proceeds would be approximately $400,000. Paulos actually received $350,155 prior to the close of 1988 from the sale of her stock. At the time of hearing, Paulos had proof of liquid assets in money market funds and CD deposits totalling over $200,000. (Paulos Exh. 4; Paulos, Tr. 489-90, 607, 675.) There are no findings sought by opposing applicants that Paulos did not have a reasonable assurance of $123,000 in liquid assets when she certified on Form 301.

32. At the time that she certified, Paulos had only a non-written verbal expectation, based on representations of Detz, that she would receive sufficient funds to construct and operate an FM station at Sebastopol from proceeds of the sale of Visionary Radio Euphonics, Inc. ("VRE-I") and its affiliated companies, Visionary Radio Euphonics of Oregon, Inc. ("VRE-O"), Visionary Radio Euphonics of Oregon, Inc. ("VRE-LC") and Mendocino Coast Wireless Company, Inc. (MCWC). (Paulos Exh. 4.) Paulos testified that on March 12, 1988, VRE-I, VRE-LC, VRE-O and MCWC entered into written agreements to sell the stations to Keffco, Inc. ("Keffco"). (Paulos Exh. 4 at 4.) Paulos owned a 9.37% interest in VRE-I and a 7% interest in MCWC. (*Id.*) The application for assignment was filed on April 1, 1988. (*Id.*) Paulos certified to her financial qualifications on May 9, 1988, and she filed her application on May 18, 1988. She had been told by Detz that she would receive a sum of money which would be about triple the amount that she had estimated she would need to construct and operate. (Paulos Exh. 4 to 5.) Paulos received $350,155 from the sale proceeds at the end of 1988, after she had certified and filed.

33. When she certified, Paulos admits that she had cash in a checking account totalling $4,902, an automobile and her stock ownership in VRE-I and MCWC. (Paulos, Tr. 475, 478; Paulos Exh. 4 at 7.) But at that time she also had credit card indebtedness amounting to $3,362 which left her an excess of liquid funds of only $1,500. Even that amount was committed to covering Paulos' filing fee with the Commission in the amount of $1,800. (Paulos, Tr. 605.) When she certified, Paulos was relying on Detz's oral advice that her net share of the sale proceeds would be $350,000. (Paulos, Tr. 480.) In order to reduce her tax liability, Paulos transferred stock to her daughter in 1988 valued at approximately $80,000 and her daughter transferred the stock back to Paulos in 1989. (Paulos, Tr. 482-83, 485-86.) She only spoke with her accountant about tax liability with respect to the sale proceeds in November 1988, after she had certified. (Paulos, Tr. 602.)

Real Party-In-Interest

34. The burden of proceeding with evidence was assigned to a former competing applicant, Beth Knight.[14] As indicated above, the first Visionary entity and its affiliates were sold in 1988. A second corporation, Visionary Related Entertainment, Inc. ("VRE-II"), was formed in November 1988 by John Detz. VRE-II applied for the assignment of Station KAOI(FM) where Paulos had been employed since October 1, 1990.

35. Paulos has admitted that she has lived with Detz on and off for the past ten years in Forestville and in Santa Rosa. (Paulos, Tr. 734.) Paulos has testified that she and Detz never married and that therefore there is no community property. Paulos contends that the only joint enterprise was the ownership of VRE-I and its affiliates. Paulos invested her own monies, each received a *pro rata* return from the sale proceeds, and the VRE-I venture was liquidated. (*See* Paulos PFC at 20 and authorities cited.)

36. According to Paulos, Detz organized VRE-II as a corporate shell in November 1988. (Paulos, Tr. 738.) It was Paulos' belief that Detz intended to use VRE-II as a vehicle for broadcast investments in the Los Angeles area and that some former shareholders in VRE-I would be contacted. (Paulos, Tr. 742-43.) First, the evidence of VRE-II's structure will be considered. Then the testimony will be analyzed in view of the corporate structure.

37. Detz was the sole incorporator of VRE-II. The first meeting of directors was held in an attorney's office in Santa Rosa on February 7, 1989. Paulos and Detz had both used the attorney's services in the past. (Paulos Exh. 5.) Paulos testified that she had paid $1,000 for all of the issued and outstanding stock of VRE-II on December 31, 1988. (*Id.*) But the documentary evidence relied on, Minutes of the First Meeting of the Board of Directors, reflects a date of February 7, 1989. (Paulos Exh. 5 at Att. A.) The document reflects that Paulos purchased 1000 shares of stock for $300 cash and there is no reference back to December 31, 1988, as the transaction date.[15] (*Id.*) The document also reflects that Paulos was elected a director, president and treasurer. After the election of directors and officers,[16] Detz resigned as the temporary chairman. (*Id.*)

38. Paulos testified that when Detz's contemplated venture failed to materialize, Pauls proposed to Detz that she use VRE-II for her non-profit work. (Paulos, Tr. 742-43.) Detz apparently agreed. But Detz remained the sole signatory on the VRE-II checking account from December 20, 1988 to May 5, 1991. Such a holding out of control to a bank constitutes substantial evidence that Detz never intended to relinquish control. Paulos confirms that conclusion in her testimony that she never wrote a check on the account. Detz was the only one who wrote the checks. (Paulos, Tr. 765-66.) She testified that during the period of time that Paulos was the elected president of VRE-II, Detz handled all of the corporation's financial matters and he drew a salary in an amount that was not known to Paulos. (Paulos, Tr. 759, 765-66, 775-77, 782, 785, 792-93, 840-42.)

39. While Detz was in control, Paulos proposed using VRE-II as a vehicle to carry out non-profit projects that included the Luther Burbank Center ("LBC"), KRCB-TV ("KRCB") and the Sonoma Mountain Zen Center ("Sonoma"). (Paulos, Tr. 743-44.) Based on documents entitled "Working Agreements" that were drafted by Detz, the non-profit ventures contemplated that a portion of monies to be advanced by Detz would be returned to VRE-II in the form of "consulting fees." (Paulos, Tr. 815-17, 842, Knight Exhs. 12, 13.) Even a portion of the transaction referred to as an "unrestricted gift" would be refunded to Detz unless a plan acceptable to VRE-II was approved by April 1, 1989. Under The Working Agreements, VRE-II would receive income of approximately $120,000 in 1989 for promotional services to be rendered in that year by VRE-II. (Paulos, Tr. 840-41.)

40. In December 1989, Paulos sold VRE-II to Detz after a celebrity guest that she had scheduled for an event had cancelled. (Paulos, Tr. 820.) She sold out to Detz without first having the company valued. (Paulos, Tr. 828-29.) The sales prices was $1,600 based on a balance sheet of which Paulos had no personal knowledge as to its source or its accuracy. (Paulos Exh. 5 at ¶ 3; Paulos Exh. 5A at 19; Paulos, Tr. 836-45.)

41. After Detz purchased VRE-II from Paulos, he used it as his vehicle to purchase the two Maui radio stations, KHEI and KVIB, and Station KAOI at Wailuku. (Paulos Exh. 5A at 27-29.) Detz also sold KDLX to Cub Media, a corporation that consisted of former shareholders of VRE-I, except for Detz and Paulos. (Paulos Exh. 5A at 30; Paulos, Tr. 871-76.) Paulos joined KAOI on October 1, 1990, as an employee. (Paulos Exh. 5 at 3.) There is no documentary evidence, or corroborating evidence of a witness, to prove that Paulos ever acquired an ownership interest in KAOI or in any of the Hawaiian broadcast properties acquired by VRE-II.[17] Knight did not produce Detz or Charlene Claus, corporate secretary and director of VRE-II, to testify on the subject. From the totality of the evidence, it cannot be found as a fact that Paulos was an undisclosed principal in VRE-II.

Paulos' Testimonial Candor

42. Knight's counsel conducted cross-examination of Paulos with respect to her purported signature. The minutes of the first meeting of VRE-II's board of directors reflect the name of Lucinda Paulos after the date of February 10, 1989. (Paulos Exh. 5A at 13.) The meeting was reflected in the minutes as taking place on February 7, 1989. That was the meeting at which Detz was the acting chair and Paulos was elected president, a director and an authorized purchaser of 1000 voting shares of stock. (*Id.*) Paulos was asked and she answered as follows:

> Q. Have you ever seen that document? Did you ever see that document before this exhibit was put together?

> A. No, I didn't, except for a signature I signed it, but I never really reviewed it. I don't recall any of the details really.

(Paulos, Tr. 786.) She further testified that she did not recall the meeting and she has "no personal knowledge" about the meeting. (*Id.*) Then, moving to the signature page, Mr. Tillotson asks Paulos and she answered as follows:

> Q. That's not your signature actually there, is it? Somebody signed for you.
>
> A. I can't recall. I really don't recall.
>
> Q. No, no. I'm looking at the signature - - - and I'm not an expert in signatures by any means but I see that the hand seems to be substantially different.
>
> A. I don't recall. I do sign my name different ways, and I'm not saying this is the reason. I don't recall signing this.

(Paulos, Tr. 787-88.) There is a continuing colloquy and Paulos again testified: "I sign my name many different ways, but I can't recall signing this." (Paulos, Tr. 788.) From this evidence of categorical denial of recollection on the part of Paulos, it is found as a fact that Paulos did not sign her name to the minutes of the first meeting of the board of directors. It is further found that Paulos submitted a misleading document to the Commission as an exhibit in this case.

43. Paulos has denied in a pretrial discovery deposition[18] that Detz was involved in either the formation or the operation of VRE-II. Paulos testified in her deposition that VRE-II was founded by Paulos, that Detz's involvement in VRE-II was "none whatsoever", and that she "ran" the company. (Paulos, Tr. 757.) Then Paulos admitted in her hearing testimony, after being confronted with conflicting evidence, that the initial corporate vehicle was founded by Detz and that Detz became an employee of VRE-II in 1989. (Paulos, Tr. 758-59.) Then she admitted when asked that Detz had set up the VRE-II checking account and that he handled the corporate financial matters. (Paulos, Tr. 759.) It is found as a fact that the testimony of Paulos' deposition was inconsistent with the testimony of Paulos at hearing and in open court with respect to the substantial roles of John Detz in the formation and operation of VRE-II in 1988 and 1989.[19]

44. Paulos contends that her ownership of VRE-II in 1989 was a result of her interest in performing non-profit works. (Paulos, Tr. 743-44.) But the evidence shows that Detz used the "non-profit" theme as a ploy to engage in profit making schemes with three entities: LBC, KRCB-TV and Sonoma. The scheme worked essentially as follows. Detz provided his personal funds as apparent contributions. But the recipients were required to enter into "Working Agreements" that were prepared by Detz. (Knight, Exhs. 12 and 13.) Those agreements required the employment of VRE-II for promotional services as a condition for receiving Detz's money. In the Agreement between VRE-II and KRCB-TV, monies totalling $100,000 were to be paid in three increments: part one was an undefined grant of $34,000; part two funds in the amount of $33,000 were to be used for expenses in organizing promotional events; and part three monies in the amount of $33,000 were to be used to pay VRE-II's consulting fees. (Knight Exhs. 12, 13; Paulos, Tr. 815-17, 842.) Monies for parts two and three were subject to a joint budget. If within three months of executing the Agreement there is no agreement reached with respect to a budget, VRE-II could terminate the Agreement and the entire $100,000 (without interest) would be returned to Detz. (Knight Exh. 13.) A similarly structured Agreement was entered into between VRE-II and LBC involving $160,000. (Knight Exh. 12.)

45. Paulos was the nominal chairman of the board, president and sole voting shareholder of VRE-II for 1989. She paid $1,000 to buy in and she sold out a year later to Detz for around the same price. Paulos contended that she wanted to help the non-profits and that she "didn't care about the money." (Paulos, Tr. 829.) But the "Working Agreements" provided that in 1989, VRE-II would receive approximately $120,000 for promotional services on behalf of the non-profits. (Paulos, Tr. 840-41.) In addition, during 1989, Paulos was a salaried employee of KRCB-TV which was one of the non-profits that had an Agreement with VRE-II. (Paulos, Tr. 688, 810-13.) From this evidence taken in its entirety (Paras. 43 to 44), it is found that VRE-II was organized and established by Detz and that Paulos fronted as its controlling chief executive officer, director and shareholder in order to facilitate a profit-making scheme under the "Working Agreements" which were controlled by Detz. It was false testimony on the part of Paulos that she was in sole control over VRE-II's operations in 1989 and that she operated VRE-II as a non-profit corporation. She received the return on her investment of $1,000 when Detz's business purpose for VRE-II was completed in December 1989.[20] Detz then continued to use VRE-II in 1980 for its originally intended purpose to acquire broadcast stations that year, although the stations were in Hawaii instead of California.

Bodega Communications, Inc.

Proposed Integration

46. BCI is a California corporation. It is capitalized to authorize issuance of 15,000 shares of voting common stock and 60,000 shares of non- voting common stock. (BCI Exh. 1.) Manuel Coronado ("Coronado")[21] is president, secretary, chief financial officer, and a director of BCI. Coronado is proposed to be BCI's full-time general manager. (BCI Exh. 2.) BCI also seeks a minority preference for Coronado who is Hispanic of Mexican descent. (*Id.*)

47. Coronado has subscribed for 15,000 shares of the voting stock. Coronado's stock position has not yet been totally effected. He signed a Subscription Agreement on May 20, 1988, but he has not yet received a stock certificate. (BCI Exh. 5 at 32.) Coronado testified that thus far he had paid $7,200 for 20% of the 15,000 shares. He borrowed the funds from Communications Venture Capital Groups (CVCG"). (BCI Exh. 5 at 33, 35, 42.) The Subscription Agreement, as signed by Coronado on May 20, 1988, reflects no dollar amount (the space is blank) for his subscription for 15,000 shares. (BCI Exh. 5, Att. 1.)

48. CVCG is a California corporation and holds a debenture issued by BCI in the face amount of $60,000. In return, CVCG received the right to convert any outstanding loan to the number of non-voting shares of stock which, when issued, represent 80% of the outstanding

shares of common stock of BCI. (Carollo Exh. 10: Joint Stipulation Regarding BCI.) A corporate structure using these two classes of stock was the idea of counsel for BCI and not Coronado. (BCI Exh. 5 at 29.)

49. Coronado had not invested any of his own funds in the venture which were at risk. The monies that he advanced for his partial stock purchase in the amount of $7,200 were paid by CVCG and not by Coronado. (BCI Exh. 5 at 42.) And it is only in the event that BCI receives the grant that Coronado considers himself obligated to repay CVCG for his investment. (BCI Exh. 5 at 58.) The few expenses paid personally by Coronado in the amount of $600 and some undisclosed legal fees will be repaid to Coronado by BCI. (BCI Exh. 5 at 43-44.)

50. BCI's counsel, Paul A. Zevnik ("Zevnik"), put Coronado in touch with CVCG. The first and only contact between Coronado and CVCG was a telephone call on or about May 10, 1988, from CVCG's president, Richard DeWitt. That telephone conversation did not involve any negotiations with Mr. DeWitt since BCI's counsel had already negotiated the terms for CVCG's financing.[22] It was merely an introductory conversation. DeWitt never asked Coronado for any credentials.

51. Coronado first learned of the Sebastopol frequency by reading about its availability in *Broadcasting* magazine. Coronado contacted Mr. David Garcia who put Coronado in touch with Zevnik. (BCI Exh. 5 at 11-12.) Zevnik provided Coronado with operation and construction cost estimates in the amount of $400,000. (BCI Exh. 5 at 13, 15-16.) Coronado had not prepared a budget and he made no independent assessment of the accuracy of counsel's figures. (BCI Exh. 5 at 14, 17.) As indicated below, Zevnik arranged for CVCG participation and CVCG arranged for a commitment letter. (BCI Exh. 5 at 65.) Coronado presented no documentation on behalf of BCI in connection with a commitment letter. (BCI Exh. 5 at 65.) Zevnik also obtained BCI's engineer. (*Id.* at 19.) But it was Coronado who located the tower site in Sebastopol and he also negotiated with the site owner. (BCI Exh. 5 at 22.) The totality of these circumstances support a finding that Coronado was not in control of substantial business decisions in the prosecution of BCI's application.

52. As the station's general manager, Coronado will be responsible for the day-to-day operation and all functions, including programming, news, business, sales, engineering and implementation of EEO policies. (BCI Exh. 2 at 1.) He will terminate all other employment and business activities in order to meet his commitment as general manager. (*Id.*)

Broadcasting Experience

53. BCI has not claimed any enhancement credit for Coronado's broadcasting experience. There is no evidence in the record that reflects such experience and Coronado has admitted that he has no experience in broadcasting. (BCI Exh. 5 at 18.) Therefore, there will be no enhancement awarded to BCI for broadcasting experience.

Local Residence and Civic Activities

54. Coronado does not reside within the 1 mV/m service area of BCI's proposed station. He does propose to relocate his residence to Sebastopol if BCI is declared the winner. (BCI Exh. 2 at 2; BCI Exh. 5 at 28.) There is no evidence of record that reflects any civic activities of Coronado within the service area.

Auxiliary Power

55. BCI will install auxiliary power facilities at its studio and transmitter sites. (BCI Exh. 3 at 1.).

John A. Carollo, Jr.

Proposed Integration

56. Carollo is applying as an individual sole proprietor. (Carollo Exh. 1.) The prosecution of his application and the construction and operation of the station has been and will be financed from resources that are jointly owned by Carollo and his wife. (Carollo, Tr. 983)[23] Carollo is not seeking a minority preference.

57. Carollo is a physician engaged in the practice of family medicine in Sebastopol. He has been engaged in this practice since 1959. He works as a physician seven days per week and he has decided that it is time for him to leave the practice of medicine.[24] (Carollo, Tr. 949-51.)

58. Carollo proposes to devote full-time to putting a Sebastopol station on-the-air and operating it as general manager. (Carollo Exh. 1.) He will make all programming decisions, supervise all administrative and operational facets and make all of the personnel decisions. (Carollo Exh. 1; Carollo, Tr. 981.)

59. Carollo will employ his current secretary to work at the station.[25] She will be responsible for billing, collection of revenues, and the proper distribution of funds. (Carollo, Tr. 963-65.) Carollo's wife also will work part-time at the station but her chores and times are not accounted for in Carollo's proposal. (Carollo, Tr. 934.)

60. Carollo also will employ on a part-time basis an undefined number of students in the Sebastopol area. (Carollo, Tr. 939.) Those persons who are engaged in sales will receive a 20% royalty on the actual revenues realized from sale of the advertising time.[26] (Carollo, Tr. 935.) Carollo intends to use students as part-time announcers and he will not employ a full-time announcer. (Carollo, Tr. 965.) Carollo admits that his proposal which relies on student volunteers will require a substantial amount of his time to be spent on coordination. (Carollo, Tr. 977-79.)

Broadcasting Experience

61. Carollo claims no enhancement credit for any past broadcast experience. (Carollo PFC at 24.)

Local Residence and Civic Activities

62. From April 1962 until August 1963, Carollo resided within Sebastopol's city limits. From August 1963 to the present he has resided approximately 1.5 miles from the center of Sebastopol or .25 miles from the Sebastopol town line. (Carollo Exh. 1 at 1-2.) Sonoma County has jurisdiction over the area in which Carollo resides and there is no intervening community between Carollo's residence and

the Sebastopol town limits. (Carollo, Tr. 929-30, 1010.) (*See also* Knight Exh. 16 [Sebastopol/Santa Rosa Area Map.])

63. From 1965 to 1988, Carollo owned and occupied professional offices within the Sebastopol city limits. In 1988, he sold that property and moved to his current office which has a Sebastopol address but which is located outside the town limits. (Carollo Exh. 1 at 2.)

64. It is concluded that Carollo receives credit for residing within the service area for one year and for receiving substantially the same credit for a period of twenty three years when he had offices within his proposed service area. In addition, Carollo receives credit for residence within his service area for a total of thirty years.

65. Carollo has volunteered his services to certain civic activities in Sebastopol. (Carollo Exh. 1 at 2-5.)[27] Since 1965, he has made annual presentations to local high schools to encourage college attendance. As the area representative of the college he attended, Carollo also conducted interviews of prospective students. From 1968 to 1972, he served at the request of the Sonoma County School Board as an appointed member of a committee that recommended selections of science text books for use in schools in Sebastopol. In 1970, Carollo worked as a volunteer on raising funds to repair and expand a high school in Sebastopol. And from 1970 to 1975, Carollo served on a Vocational School Development Committee which made recommendations to the Sonoma County School Board.

66. In 1968, Carollo became a volunteer member of the Intensive Coronary Care Unit Committee. As a result of the Committee's work, an intensive care unit was opened at a hospital in Sebastopol. (Carollo Exh. 1 at 3.) In addition, Carollo has been a member of the Sonoma County Medical Society since 1962. He served on that Society's Foundation for Medical Care during an undisclosed period of time. He also served on the Insurance Committee (1969-71), the Finance Committee (1971-72), and the Civil Defense/Disaster Preparedness Committee. (Carollo Exh. 1 at 4.) The latter committee developed medical contingency plans in the event of an earthquake. (*Id.*) Carollo also served on a Nursing Home Liaison Committee and on a County Vocational Rehabilitation Committee.

67. Through membership for twenty years on the vestry of a church in Sebastopol, Carollo assisted in the operation of food and shelter programs for senior citizens. Specifically, lunches were served at the church to senior citizens on Monday through Friday. Carollo is now engaged in a project to move the Senior Center onto the church's property and to establish an adjacent thrift shop. (Carollo Exh. 1 at 4.)

68. The findings with respect to civic activities (Paras. 65-67) reflect a greater quantum of participation in the 1970s than in the more recent years. Also, Carollo has not offered evidence on how much time he spent on each committee or project. For example, Carollo seeks credit for lunches that are served to senior citizens at the church he attends. He is entitled to credit for work on a committee that instituted the program. But he has not testified as to whether or not he is present at the church to actually distribute or serve the food to the elderly. These deficiencies in proof will be taken into account in assessing a comparative value in the conclusions below.

Auxiliary Power

69. Carollo will install auxiliary power facilities at his studio and transmitter sites. (Carillo Exh. 4.)

Manzanita Media, Inc.

Proposed Integration

70. MMI is a California corporation that has only one class of stock-voting common. It's ownership structure is as follows:

Name	Equity Interest	Percent Equity	Officer/ Directorship
Carole A. (Kushnir) Crew	7,200 shares	60%	Chief Executive Officer/ Chief Financial Officer/Director
Rene Ocana	2,400 shares	20%	Vice President/ Director
Kenneth Kushnir	2,400 shares	20%	Secretary/Director

(MMI Exh. 4 at1).

Crew's Integration (60 %)

71. Carole A. (Kushnir) Crew ("Crew") is the former spouse of Kenneth Kushnir ("Kushnir"). She will be the CEO/CFO and the numerically controlling shareholder. Crew does not categorically plan to work full-time, *i.e.*, forty hours per week. But she will be responsible for the management of corporate and financial affairs and the station's operations. (MMI Exh. 1.) MMI sought a female preference for Crew's participation.

72. Crew presently has a 49% interest in Empire Communications, Inc. ("Empire") of Santa Rosa. Empire is an FCC licensee engaged in non-broadcast communications lines of business which include the sales and servicing of two-way radio systems, office telephone systems, pocket pagers and car telephones. (MMI Exh. 6 at 8.) Crew is committed to curtailing or leaving Empire if those duties conflict with her duties at Sebastopol. In that regard, Crew believes that her duties at the Sebastopol station would require 70% of her time. (MMI Exh. 6 at 60.) Therefore, she may merely take a leave of absence from Empire and return at some later date. (MMI Exh. 6 at 61-62.) There is no evidence indicating that Crew will sell her equity ownership in Empire. Nor is there a specific plan on how Crew's duties at Empire would be carried out in her absence.

Ocana's Integration (20 %)

73. Rene Ocana ("Ocana") has committed to work full-time as the station's general manager. (MMI Exh. 2.) He will control and supervise the overall operational aspects of the station which includes staffing, programming, sales and marketing. He will leave his current employment to assume full-time responsibility as general manager. This can be accomplished on two weeks' notice. (MMI Exh. 7 at 31, 33-34.)[28]

74. Ocana has been actively involved in the prosecution of MMI's application. Ocana spoke with a bank official and provided a personal guarantee in connection with

financing. (MMI Exh. 7 at 9.) He gave input to Crew about the cost of station equipment and selection of an engineer and he discussed technical matters with the engineer about the site proposal. (MMI Exh. 7 at 8, 11, 16, 27.) MMI seeks a Spanish surname Minority preference for Ocana's participation.

Kushnir's Integration (20 %)

75. Kenneth Kushnir ("Kushnir") has committed to work full-time at the station as chief engineer. (MMI Exh. 3.) Kushnir asserts that he also will be responsible for regulatory compliance and for dealing with legal and engineering counsel. (*Id.*) However, Kushnir will not be supervising employees and the descriptions of his responsibilities do not include policy or management duties.[29]

76. Kushnir presently owns 51% of Empire. As with Crew (a 49% owner of Empire), Kushnir committed to "curtail or leave" his employment with Empire in order to effectuate the MMI proposal. He has owned Empire for twenty-two years and he has no intention to sell Empire even if MMI's application is granted. (Kushnir, Tr. 1031.) Crew, his former spouse, testified that Empire was Kushnir's full-time employment. (MMI Exh. 6 at 63.) There is no evidence offered by MMI of the size of Empire's operations (*e.g.*, number of employees, gross sales, value of inventory). Nor did MMI offer evidence of a specific plan for Kushnir to "curtail" his full-time commitment to Empire, including management staffing that could and would replace or fill in for himself and Crew while they were attending to broadcast business at the Sebastopol station.[30]

Broadcasting Experience

77. No broadcasting experience is claimed for Crew.

78. Ocana was general manager and a director of Bilingual Broadcasting Foundation ("Bilingual"). From 1983 to 1989 he was owner of Bilingual's non-commercial educational Station KBBF-FM, Santa Rosa, CA. Ocana also served as a communications consultant for the California Human Development Corporation at Station KHDC in Salinas, CA. (MMI Exh. 2 and Exh. 4 at 10.)

79. Kushnir was a member of the board of directors of Bilingual Broadcasting Foundation, Station KBBF-FM's licensee, from 1986 to 1988. He also has other unspecified engineering experience. (*See* MMI's PFC at 9.)

Local Residence and Civic Activities

80. Crew has presented proof that she has worked in the Santa Rosa area at Empire for fifteen years.[31] She also had resided at an earlier unspecified time in Sonoma County which MMI asserts is in the "general area" of the station. (*See* MMI PFC at 5; MMI Exh. 6 at 10-11.)

81. Crew has served from 1984-1987 as a committee member for the Sweetheart Ball Fundraiser and for the Volunteer Center of Sonoma County. She has been involved with the Inner Wheel of West Santa Rosa serving on its board of directors from 1985 to 1988. She was president of the Club Liaison of the New Directions Adolescent Services Center from 1986 to 1987. From 1988 to 1989, she was a member of the Soroptomists and served as fundraising co-chair of the Mardi Gras Ball in 1989.[32] She is also a member of Big Brothers/Big Sisters of Sonoma County, where she served in 1988 as a committee member for the Holiday Extravaganza Fundraiser. In 1989 she served as assistant to the president of the board of directors for the 1989 Holiday Extravaganza. (MMI Exh. 4, 10-11).

82. Ocana has resided within MMI's proposed service area for nine years. (MMI Exh. 2 and Exh. 4 at 9.)

83. Ocana was a member of the board of directors of the Santa Rosa Red Cross from 1987 to 1988. He was a founder and member of the board of directors of the Hispanic Chamber of Commerce of Sonoma County from 1987 to 1988. (MMI Exh. 2 and Exh. 4 at 10.) Ocana also served as a member of the Oral Review Board for the Sonoma County Sheriff's Department,[33] as a minority consultant for the Sonoma County Foundation in 1988, and as Secretary of the Board of Directors of Latinos in Communications, a national organization designed to assist minorities in communications.

84. MMI does not assert a local residence for Kushnir. (*See* MMI's PFC at 9.) The evidence relied on for service area residence represents that for approximately thirty years Kushnir has resided in the "general area of the station - Healdsbury (Sonoma County) California." (MMI Exh. 3 and Exh. 4 at 8.) But Crew has testified that the Healdsbury residence was outside of the service area. (MMI Exh. 6 at 7.) Therefore, no credit will be awarded for Kushnir's residence.

85. Kushnir was past president of the West Santa Rosa Rotary Club from 1988 to 1989. (MMI Exh. 3.) This time period overlaps the date of filing of MMI's application. It also has not been established that the activities were performed within the service area. Therefore, no credit will be awarded for Kushnir's activities with the Rotary Club.

Auxiliary Power

86. MMI will install auxiliary power generating equipment to provide for continued service in the event of a power loss. (MMI Exh. 5.)

CONCLUSIONS OF LAW

87. Section 307(b) of the Communications Act requires the "fair, efficient and equitable distribution" of broadcast service and an assessment of the evidence must be made under the applicable Commission standards in determining which applicant meets the statutory standard. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965).

88. The primary concerns under the Act are: (1) maximum diffusion of control of the media of mass communications or diversification; and (2) best practicable service to the public. *West Michigan Broadcasting Co.* v. *F.C.C.*, 735 F.2d 601, 603-07 (D.C. Cir. 1984). Thus, comparative credit will be awarded to applicants which are without other media interests. The "best practicable service" standard includes the integration of ownership and management and the enhancement of such integration by local residence, civic activities, broadcast experience and minority racial preference.

Comparative Proposals

89. Before conducting the comparative analysis, a determination of the basic qualifications of Paulos must be made. *Louis Adelman*, 28 F.C.C. 432 (Comm'n (1960), *recon. denied* 29 F.C.C. 1223 (Comm'n 1960), *aff'd sub nom. Guinan, et al.* v. *F.C.C.*, 297 F.2d 782 (D.C. Cir. 1961). There are also substantial questions raised about

integration proposals and their *bona fides* which will be considered under the standard comparative issue. *See, e.g., N.E.O. Broadcasting Company*, 103 F.C.C. 2d 1031, 1035 (Review Bd 1986). Here there is substantial evidence to consider on the issues of the *bona fides* of BCI's integration proposal through Coronado and the commitments of Crew and Kushnir to leave their current business at Empire to integrate into the station's operations.

Diversification

90. None of the four applicant parties owns an attributable interest in a means of mass communications. (*See* Para. 10, *supra*.) There is no substantial evidence to show that Paulos is an undisclosed principal in the Hawaii broadcast stations and therefore she receives no demerit for an attributable media interest. (*See* Para. 41, *supra*.) Each applicant proposes conclusions that no party (other than Paulos) should receive a diversification demerit. (*See* Paulos PFC at 74-75; BCI PFC at 35-36; Carollo PFC at 77-78; and MMI PFC at 21-23.) Therefore, no party receives a diversification credit or demerit. *Policy Statement On Comparative Broadcast Hearings*, *supra* at 394-95.

Comparative Coverage

91. The parties were required to submit evidence on comparative coverage because such evidence was called for under the *HDO*. A joint engineering exhibit which was received in evidence showed by substantial evidence that there are no significant differences between the proposed signal coverages of the areas and populations within the respective Grade B Contours. (*See* Para. 11, *supra*.) Accordingly, no party receives a comparative credit for a superior proposed signal coverage.[34]

Basic Qualifying Issues

Paulos' Financial Qualifications

92. Paulos' financial certification must be assessed under the reasonable assurance standard. *Scioto Broadcasters Limited Partnership*, 5 F.C.C. Rcd 5158 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 4626 (Comm'n 1991). And in order for Paulos to certify to having a reasonable assurance, she first must have made a reasonable, good faith effort to estimate what it will cost to construct the station and operate the station for three months without revenues. *Armando Gracia*, 3 F.C.C. Rcd 1065, 1067 (Review Bd 1988), *rev. denied*, FCC 88-258, adopted July 28, 1988. *See also Vela Broadcasting*, 2 F.C.C. Rcd 3663, 3665 (Review Bd 1987).

93. The facts as found (Paras. 23 to 33, *supra)* establish by a preponderance of substantial evidence that Paulos did not have any objective basis or systematized method for determining costs before she certified. She spoke generally with two engineers about costs. But those conversations with Freedman and Leggett were sporadic and unfocused. And Paulos admitted that she relied on her "experience" as the basis for estimating dollar amounts. But her experience was in programming and sales exclusively. She was not engaged in financial matters relating to construction and operations in connection with her prior broadcast experience. She has testified that she was not a person concerned with "financial details." (Para. 30, *supra*.) Finally, there were no documents offered in evidence that would support line-item estimates. The one relevant document (Exh. 4, Att. A) reflects only conclusory estimates and that document may have been created sometime after certification, which raises a question of doubt regarding its reliability.

94. Financial issues were added against Paulos for the failure to show that Paulos was involved in the process of determining costs or that she had worked with someone who was knowledgeable about costs. *See Memorandum Opinion and Order*, FCC 91M-769 *supra* at Para. 14. Notwithstanding the burdens of proceeding and proof being assigned to Paulos, she failed to offer credible proof. It will not be inferred that Paulos was capable of estimating accurate costs based on her experience in programming and sales, particularly when there are no documents and no corroborating witnesses that were sponsored by Paulos to show that she had obtained qualified advice on costs prior to her certification. She may have memorized after-the-fact cost figures in her preparation for her cross-examination. But that would not meet the standard because an applicant must have met the financial qualifications, including an estimate of costs, at the time of certification. *Aspen FM, Inc.*, 5 F.C.C. Rcd 3196 (Comm'n 1990). And she admitted on cross-examination that while she was relying on purchasing used equipment in order to keep costs down, she had done nothing to verify the prevailing prices of used equipment.

95. In, *Northampton Media Associations*, 4 F.C.C. Rcd 5517, 5518-19 (1989), the Commission held:

> In order to prove reasonable assurance of financial qualifications, the applicant must adduce probative evidence that, prior to certification, it engaged in serious reasonable efforts to ascertain predictable construction and operation costs. . . . Probative evidence necessarily includes something more than the self-serving, uncorroborated statement of the individual responsible for certification . . . .

The Commission noted, with approval, the applicant's reliance on a principal's "general business experience" and the "advice of a consulting engineer." Here there is no similar evidence relating to Paulos. Also, in *Northampton* it was proven that before filing, the principal who had demonstrated past business experience had also consulted at length with an experienced broadcaster and a consulting engineer to learn the construction costs and the costs of three months of operating without revenue. *Id.* at 5519, Para. 17. Even where no contemporaneous documentation is required,[35] an applicant:

> must adduce probative evidence that *prior to certification*, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs.

Id. at 5519, Para. 15. (Emphasis added.) Paulos asserts that she relied on quarterly reports of VRE-I expenses before and after certification. But none of those reports were offered in evidence. *See* Paulos' RPFC at 8. It is concluded here that Paulos' mere reliance on her experience in programming and sales, without specific documentation of independent efforts made to obtain independent objective cost data, on line-item costs or evidence of qualified detailed assistance rendered before certification, did not con-

stitute the required "serious and reasonable efforts "required by the Commission in *Northampton*. Cf. *Armando Garcia*, *supra*, where the Commission accepted the estimates of an applicant who "had in minute detail *prior* to the filing of his - - -application, reviewed each and every category of possible expense for a virtually identical facility in an adjacent community - - -." 3 F.C.C. Rcd at 1066. There is no evidence in the record here to support an *Armando* finding.

96. The Commission has consistently expected and required that cost data be marshalled before certification and that adequate documentation be available. Where cost data was assembled from an equipment catalogue and presented in an affidavit, such evidence was rejected as unreliable hearsay. *United Broadcasting Company*, 93 F.C.C. 2d 482, 508 n. 114 (Comm'n 1983). Based on that authority, Paulos' testimonial recollection of having seen VRE-I quarterly reports, which were never offered in evidence, is also rejected here as unreliable recollection testimony. In that case, the Commission held that an applicant is required to show that essential items of equipment are either possessed or are reasonably available at a cost which would not impair financial qualifications. *Id.* And the Commission specifically held:

> Although [the applicant] may have intended to obtain comparable used equipment, it is not sufficient simply to allege that comparable equipment is available.

93 F.C.C. 2d at 508. There was no evidence offered by Paulos to show that she had anything more than an intention to obtain and utilize used quipment without any showing that such equipment would be available and able to be purchased at prices within her budget estimate.

97. Paulos relies on the case of *Kaye-Smith Enterprises*, 98 F.C.C. 2d 675 (Review Bd 1984). In that case, the financial issue was set by the Commission in a designation order. It was a renewal case and the challenger whose financing was in question had been a broadcaster for 35 years. The Commission was concerned about the lack of documentation to show the accuracy of estimates for monthly rental of an antenna site and the absence of written documentation verifying the costs and terms of an equipment lease. There the Review Board noted that the financial issue was tried as limited by the Commission to the two items of noted concern for which there was a lack of documentation. The narrow evidence relevant to those two issues of fact was considered by the trial judge and the question of its reliability was resolved in favor of the applicant. *Id.* at 677. The appellant challenged those favorable findings on grounds that there was no evidence offered and considered on legal, engineering, installation and other miscellaneous costs. *Id.* The Review Board held that those factual issues were not relevant because of the narrow precision of the issues that had been set by the Commission. *Id.* Finally, the Review Board observed that the estimates were not challenged by any party as being wholly unreasonable to a person engaged in the broadcast line of business. And, in that connection, the Review Board further noted that the estimates of an applicant with 35 years of experience is entitled to "some weight." *Id.*[36] Those narrow holdings under the unique facts of that case do not support Paulos' contention that her uncorroborated conclusory cost estimates should be accepted.

98. The burden of proof was assigned to Paulos and she failed to meet it, *i.e.*, she has failed to show by a preponderance of the evidence that she had a reasonable assurance of her financial ability to construct and operate for three months, without revenue, when she certified on May 18, 1988. *See TeleStar, Inc.*, 2 F.C.C. Rcd 7352-53 (Comm'n 1987). *Cf. Steadman* v. *S.E.C.*, *supra* at 100-102. First, as concluded above, Paulos had failed to prove that she had made a considered estimate of costs. The failure to make a considered estimate of costs suffices alone to disqualify under a financial certification issue. *See Velo Broadcasting*, *supra* at 5519. Second, she has failed to prove that she had a reasonable assurance that she would have the necessary funds. The Commission has held that objective evidence as it existed at certification must establish reasonable assurance of the financing and not the expectations of the certifying applicant. *See Aspen FM, Inc.*, 6 F.C.C. Rcd 1602 (Comm'n 1991).

99. When Paulos certified to having a reasonable assurance of funding for her estimated costs of $123,000 she was relying in part on her personal cash on hand and on a prospective sale of her 9.37% interest in VRE-I. Paulos had approximately $3,100 in her checking account.[37] But cash balances in personal checking accounts are used to meet ongoing current and past unpaid expenses. For example, Paulos owed $3,262 in credit card charges. (*Id.*) There were other living expenses that were not accounted for. There was an insufficient record made by Paulos to conclude that she could reasonably be assured of having $3,262 in her checking account when she was ready to construct and operate.

100. More importantly, Paulos relied in May 1988 on expectations that she would receive approximately $350,000 from the proceeds of what was then a contemplated sale of VRE-I. Paulos' testimony is accepted that the contract for the sale of VRE-I to Keffco was signed on March 12, 1988. (Paulos, Tr. 478.)[38] (*See* Paulos PFC at 9-11.) Prior to certification, she relied on oral advice from Detz that her share of the net sale proceeds would be approximately $350,000. She ultimately received proceeds of approximately $400,000 from the sale that was effected in July 1988. The monies were paid to Paulos in late 1988.[39] But Paulos was a minority shareholder and had no control over the effecting of the proposed sales contract when she certified to a reasonable assurance in May 1988, at which time the outcome of the transaction was speculative.

101. The Commission has held that in order to prove reasonable assurance of the availability of funds the applicant must provide substantial and reliable evidence of sufficient net liquid assets on hand or committed. Such probative evidence must include more that a self-serving, uncorroborated statement that necessary steps to secure funding were taken. *See Northampton Media Associates*, *supra* at 5519. The evidence offered by Paulos was the oral advice that she had received from Detz. There were no documents offered in evidence and Detz did not appear as a witness. Thus, Paulos has failed to introduce substantial and reliable evidence to support her assertion that she had a reasonable assurance in May 1988 that the sale of VRE-I would go to settlement and that the prospective buyer would have the proceeds. As a minority owner of VRE-I she was totally dependent on Detz and therefore his testimony was required to meet her burden of proof. Otherwise the Commission would be accepting certifications that are too speculative to rely upon.[40] *Cf. Roxanne Givens*, 5

F.C.C. Rcd 5371 (Review Bd 1990), *recon. denied*, 5 F.C.C. Rcd 5905 (Review Bd 1990), *aff'd* 6 F.C.C. Rcd 2961 (Comm'n 1991) (possession of cause of action insufficient to show financial ability to construct and operate). Therefore, it is concluded that even if Paulos' cost estimate was accepted, Paulos did not have reasonable assurance of a source of funding when she certified on May 1988. Because Paulos had not made a legally sufficient estimate of costs and/or because Paulos had no reasonable assurance of funding when she certified, Paulos is not basically qualified for a grant. *Opal Chadwell*, 4 F.C.C. Rcd 1215, 1217 (Comm'n 1989) (validity of applicant's proposal must be established in order to qualify for grant).

Paulos' Undisclosed Real Party-In-Interest

102. If Paulos had an ownership interest in the Hawaiian broadcast properties of VRE-II she would be charged with a diversification demerit which would result in her losing the comparative phase of the case. Therefore, Paulos would have a motive to conceal having such an ownership interest and to mislead the Commission in failing to disclose an ownership interest in her integration and diversification statement and in her testimony. *See Fox River Broadcasting Co.*, 93 F.C.C. 2d 127, 129 (Comm'n 1983 (an act of misrepresentation must include more than an error; it must be accompanied by an intent to deceive).

103. But the evidence of record fails to support a conclusion that Paulos is or was an undisclosed principal in any of the Hawaii Stations KVIB/KHET or KAOI. The analysis of the evidence begins with the observation that there is no corporate document or contractual document in the record which would establish Paulos' ownership of or right to a future interest in VRE-II. A conclusion of ownership is asked for by competing applicants because of circumstantial evidence of a long-term relationship between Paulos and the owner, when considered with the unique circumstances of the evolution of VRE-II. Paulos has at all times denied an ownership interest in the Hawaii stations and she was subjected to extensive deposition examination and cross-examination on the added issue. There has been no admission from Paulos or any testimony from Detz or from the person who allegedly had overheard Paulos make an admission. In order to deny an applicant a license for reasons of basic disqualification, there must be substantial evidence in the record to support reaching the legal conclusion of basic disqualification. *Steadman* v. *S.E.C.*, *supra*. The mosaic of circumstances woven by Paulos' opposing applicants does not in its entirety nor in its discrete parts meet the standard of substantial evidence under the APA.

104. The evidence does disclose that Paulos had co-habited with Detz over a period of ten years and that she had owned a minority equity interest in VRE-I. (Para. 35, *supra*.) After VRE-I was sold in 1988, Detz founded VRE-II which he expected to use as a corporate vehicle for a new broadcast venture in Los Angeles. (Para. 36, *supra*.) When that business opportunity failed to materialize, ownership of VRE-II passed to Paulos. (Paras. 37-38, *supra*.) Based on past experience with VRE-I, the willingness on the part of Detz to sell a full ownership interest to Paulos for only $1,000, and the subsequent operation of VRE-II while Paulos was its owner, are substantial facts that support the conclusion that Detz and Paulos were co-ventures, with Paulos playing a secondary role, until the time that Paulos returned legal corporate control to Detz in December 1989. (Paras. 38-40, *supra*.)

105. But the venture was clearly under Detz's control from the inception of VRE-II in 1988. Detz was the incorporator, and he was the only person to sign corporate checks. Paulos was elected president of VRE-II while Detz had corporate control as incorporator and temporary chairman. Thus, Detz selected Paulos. And during the period that Paulos served as the nominal president of VRE-II, Detz handled all corporate finances and paid himself a salary in an amount unknown to Paulos. (Para. 38, supra.) The so-called "non-profit" work of Paulos was no such thing. In fact, Detz was behind the LBC and Sonoma contracts which he drew up and which were designed to return income to VRE-II in the form of consulting fees. (Para. 39, *supra*.) At no time was Paulos in control of any significant activity of VRE-II. And, in that regard, Paulos correctly summarizes the state of the record. There is no evidence of any Paulos ownership interest in VRE-II after December 12, 1989. (*See* Paulos Exh. 5 and Paulos' RPFC at 19.) *Cf. Rebecca L. Boedker*, 6 F.C.C. Rcd 2557, 2558 (Comm'n 1991) (real party-in-interest issue was properly not added by the trial judge based on speculation).

Paulos' Lack Of Candor

106. There was no specific misrepresentation or lack of candor issue added against Paulos.[41] However, lack of candor need not be specifically designated as a hearing issue and an applicant may be disqualified for candorless testimony given in open court. *Old Time Religion Hour, Inc.*, 95 F.C.C. 2d 713, 719 (Review Bd 1983). There were three situations where Paulos offered candorless testimony. First, she lacked candor or misrepresented in her testimony concerning her signature that was affixed to corporate minutes. (Para. 42, *supra*.) Second, she lacked candor, misrepresented or dissembled in her conflicting deposition testimony about Detz's early involvement with VRE-II. (Para. 43, *supra*.) Third, she lacked candor, misrepresented or dissembled in her testimony that she was engaged exclusively in "non-profit" work when she was the nominal owner of VRE-II in 1989. (Para. 44, *supra*.)

107. It is found that Paulos misrepresented and lacked candor with respect to her signature on Exhibit 5. She testified that she could not recall signing the minutes of VRE-II and that she could not identify her signature as it appeared on her Exhibit 5. Such uncertainty with respect to a matter of such degree of first-hand knowledge, i.e., whether one has signed a document of the significance of the first minutes of a corporation, requires the conclusion that Paulos did not sign the minutes.[42] Therefore, it is further concluded that Paulos presented a documented bearing a false signature to the Commission as substantial evidence in support of her written sworn testimony. While the case does not turn on the evidence, the document does relate to an issue set in this case as to whether or not Paulos is an undisclosed principal in VRE-II owned broadcast stations in Hawaii. Therefore, it is significant evidence which must be truthful when presented to the Commission. *Cf. Richardson Broadcast Group*, 7 F.C.C. Rcd 1583, *Slip Op.* FCC 92-62, released February 24, 1992 at Para. 9 (intentional deceit can lead to disqualification even if discrepancies are not significant in and of themselves).

108. It also is found that Paulos gave false testimony in her deposition wherein she falsely testified that she found VRE-II, that she ran the company and that Detz had no involvement. (Para. 43, *supra*.) These are basic structural facts about which Paulos, as the nominal chief executive officer, president and sole shareholder, had first hand

knowledge. The inconsistencies between Paulos' deposition testimony and the facts disclosed at the hearing are self-evident and no further analysis is required to conclude that Paulos had intentionally misrepresented significant evidence in her sworn deposition testimony.

109. Finally, it is found that Paulos employed an intentionally deceitful presentation of testimonial evidence in asserting that she owned and controlled VRE-II in 1989 in order to carry out non-profit ventures. And she dissembled in open court in attempting to convince the Presiding Judge that John Detz had no interest in or control of the activities of VRE-II in 1989. The facts speaks clearly for themselves. (*See* Paras. 44 to 45, *supra.*) Briefly stated, VRE-II was promoted and founded by Detz to accomplish exactly the opposite of the non-profit activities of which Paulos persisted in attempting to convince the Commission. Detz was so much in control of VRE-II that Paulos did not even know how much he compensated himself. And when Detz had finished having his way with VRE-II and his "Working Agreements," he purchased it from Paulos for $1000 and Paulos had no idea or interest in how much VRE-II was worth. The intentional and continuing efforts under oath to convince the Commission of such an evident fabrication requires disqualification. *See RKO General, Inc.*, 78 F.C.C. 2d 104 (Comm'n 1980), *aff'd RKO General, Inc.* v. *F.C.C.* 670 F.2d 215 (D.C. Cir. 1981) (intentional deceit during a Commission hearing can lead to disqualification). The Commission has held that false statements are in and of themselves disqualifying and specific notice to Paulos that she must testify truthfully would have been superfluous as a matter of law.

Best Practicable Service

BCI

110. BCI proposes 100% integration credit through Coronado. But the evidence supports the conclusion that Coronado was never in control over the prosecution of the BCI application and that Coronado merely assumed an indebtedness to CVCG in the amount of $7,200 which was a *de minimis* financial paper risk. Therefore, BCI will receive no integration credit because BCI has not met its burden of proof on the reliability of its integration proposal. *Evansville Skywave, Inc.*, 7 F.C.C. Rcd 1699 (Comm'n 1992).

111. Specifically, Coronado was put in touch with Zevnik, BCI's communications counsel, and Zevnik controlled all essential steps to be taken in furtherance of BCI's application. (Para. 51, *supra.*) Coronado prepared no budget. Coronado made no independent assessment of Zevnik's cost figures. Zevnik arranged for CVCG's participation and CVCG arranged for the financing letter. There was only one informal contact between CVCG and Coronado and Coronado was never required to produce documentation in connection with BCI's bank letter. (*Id.*) Zevnik obtained BCI's engineer. Coronado's only active involvement with the venture were his efforts to obtain a site.

112. In addition to Coronado's passive involvement, the evidence shows that CVCG holds a BCI debenture in the face amount of $60,000 which BCI can convert to 80% of the equity. The corporate structure to permit CVCG to effectively own the station was designed by Zevnik without any input from Coronado. The totality of these circumstances were not offset by substantial evidence offered by BCI which would convince by a preponderance of the evidence that BCI's integration through Coronado was a reliable integration proposal. *Royce International Broadcasting*, 5 F.C.C. Rcd 7063 (Comm'n 1990), *recon. denied*, 6 F.C.C. Rcd 2601 (Comm'n 1991). Therefore, BCI will receive no integration credit and will not be comparatively evaluated in this case.

Carollo

113. Paulos argues that Carollo's integration should be reduced by a factor of 50% because of his wife's intention to work in the station. BCI and MMI also urge that Carollo's integration be discounted by 50% because of his wife's community interest. But Carollo has proposed a sole proprietorship and there has been no evidence offered by opposing applicants to show that his wife would have an ownership interest or that she would participate in control. It is noted that none of the comparative parties in this case who have spouses, including Carollo, have submitted evidence of a written declination of intent in the California station as community property. The community property concept is exclusively a matter of state law in Commission comparative cases. *Richard P. Bott, II*, 4 F.C.C. Rcd 2508 (Comm'n 1990). Without specific proof of shared spousal control, none will be assumed.

114. The record does reflect that Carollo has used his and his wife's joint funds to pay for expenses in prosecuting his application. But the use of joint funds will not be a sole basis for rejecting an integration claim. *Jerome Thomas Lamprecht*, 99 F.C.C. 2d 1219, 1224 (Review Bd 1984), rev'd on other grounds, F.2d (D.C. Cir. 1992).[43] Of equal importance is the evident illogic in Carollo concealing his wife's identity as a 50% principal because at the time of the hearing of his case the Commission awarded a female preference. What would be the rational purpose in concealing a comparative preference?

115. Carollo's proposal to utilize students in the operations of the station is argued by certain of his opponents as an unworkable proposal. BCI characterizes the proposal as "bizarre." (BCI PFC at 30-31.) A main concern noted is the apparent diffusion in programming choices. But the evidence shows that Carollo will maintain control over programming and that he can hire and fire student volunteers at will. His opponents point to the spectre of hundreds of unsupervised students descending on the station at one time to broadcast as they deem fit. But the assumption is made that Carollo will control the ebb and flow of these studends or else he would lose quickly his investment in the station. There is no evidence offered to reject Carollo's 100% integration proposal and it will be accepted. In that connection it is noted that he planned to retire from his medical practice in September 1991 and thus there would be no job conflict with his running the station on a full-time basis.

MMI

116. MMI relies on the integration of Crew (60%) and Kushnir (20%) both of whom are owner-operators of the ongoing business concerns of Empire, a company that is engaged in the sales and servicing of a varicty of communications systems. Crew owns 49% of Empire and Kushnir owns 51%. Crew and Kushnir have owned Empire for 22 years and neither intends to sell their interests in Empire.

117. While Crew proposes to be in policy management positions as the station's chief executive/financial officer, Kushnir would serve only in connection with undefined legal duties and engineering matters. He will not be supervising employees and there are no policy or management jobs described for him. Therefore, his 20% equity will not be counted for integration. *See Policy Statement*, *supra* at 395 (Comm'n looks only to the positions of owners in the station that show a likelihood of playing important roles in management).

118. In addition to Kushnir's failure to qualify under the criteria of the *Policy Statement*, Kushnir and Crew have failed to offer evidence of a plan for the operation of Empire in their respective absences. Nor is there evidence in the record of the distance between Empire's business offices and the proposed station. There can be no favorable presumption of reasonable proximity made because MMI has the burden of proof with respect to the feasibility of its proposal. *Cuban-American Ltd.*, 5 F.C.C. Rcd 3781, 3785 (Comm'n 1990). Furthermore, the Review Board has held that in situations where an applicant proposes full-time integration into a new broadcast station who also has other substantial ongoing business interests:

> Generalized promises to "diminish" the time spent on a significant business interest is insufficient. *Leiniger-Geddes Partnership*, 2 F.C.C. Rcd 3199 (Review Bd 1987), *review denied*, 3 F.C.C. Rcd 1181 (1988); *Ft. Collins Telecasters*, 103 F.C.C. 2d 978, 985-86 (Review Bd 1986), *review denied*, 2 F.C.C. Rcd 1780 (1987). In that regard, a blanket pledge to hire more employees and diminish hours spent is not enough; we have no way to check afterwards, and were we to accept such promise where significant business interests remain, all comers would receive full-time credit.

Naguabo Broadcasting Company, 6 F.C.C. Rcd 912, 924 n. 63 (Review Bd 1991). *See also Pleasure Island Broadcasting, Inc.*, 6 F.C.C. Rcd 4163, 4165 (Review Bd 1991). While Crew and Kushnir propose to work less than full-time, the time away from Empire would be substantial and the same principle would apply in this case. It is for a failure to meet the burden of proof that BCI receives no integration credit for Crew and Kushnir. *See Cuban-American Ltd.*, *supra*. *Cf. Kevin Potter*, 6 F.C.C. Rcd 7278, 7281-82 (concurring *dubitante* of Board Member Blumenthal recommends return to prior holding that acknowledges that "the very existence" of another substantial business interest renders "exceedingly dubious" a mere promise to commit full-time to a new broadcast facility).

119. BCI's proposal to integrate Rene Ocana, a 20% equity owner, as the station's full-time general manager will be credited. BCI has shown by substantial evidence that Ocana can leave his current employment, where he is not an owner, on only two weeks notice. BCI also will receive proportionate credit for Ocana's Spanish surname, his past broadcasting experience, and his local residence and related civic activities. (Paras. 83 to 85, *supra*.)

Contingent Comparison Conclusions

120. Carollo is declared the winner because of his 100% integration credit. He would also receive a substantial qualitative credit for his long-term 30 years residency in the service area and near the city of license and a moderate credit for his related civic activities.[44] However, Carollo is entitled to a significant enhancement credit under the unified residence-civic activities factor. *Great Lakes Broadcasting, Inc.*, 7 F.C.C. Rcd 1829, 1831 (Review Bd 1992). MMI finishes second based on Ocana's 20% integration as well as his Spanish surname preference although only slight credit is awarded for his part broadcast experience and for his local residence/civic activities because they overlap with the filing of the application. *See Eve Ackerman*, Review Bd *Slip Op.* FCC 92R-30, released April 21, 1992. Paulos has been found to be basically unqualified and BCI has failed to show a reliable integration proposal. However, the four applicants will be contingently compared below in the event of a successful appeal.

121. If MMI's proposal warranted 100% integration credit, MMI would not meet or surpass Carollo's significant residence/civic activities credit. Nor would MMI comparatively surpass Carollo because of the Ocana 20% minority preference in light of the significant unified residence and civic involvement credit awarded to Carollo. If Paulos were basically qualified she would receive 100% credit for integration, a moderate credit for her local residence and related civic involvement and a slight credit for her broadcasting experience. There is no longer a female preference to award to Paulos. *See Jerome Thomas Lamprecht* v. *F.C.C.*, D.C. (Case No. 88-1395) D.C. Cir. *Slip Op.*, February 19, 1992 (Comm'n award of female preference violates Fifth Amendment of the Constitution and Comm'n has not appealed that holding). But Paulos would finish ahead of MMI because of her 100% integration, her residency and civic activities and her broadcast experience. Therefore, Paulos would finish second behind Carollo. BCI would finish just behind Paulos. Coronado would tie Paulos with his minority preference *vis a vis* Paulos' local residence/civic activity credit. *Radio Jonesboro, Inc.*, 100 F.C.C. 2d 941, 945 (Comm'n 1985). But Paulos would have a slight advantage based on her past broadcasting experience. BCI would finish ahead of MMI because of Coronado's 100% minority credit. MMI would finish last under its proposal because it could show no more than 80% integration credit since Kushnir is not proposed for any recognized managerial position.

Summary Conclusions

122. None of the parties receives a demerit for diversification and each receives an equal credit for auxiliary power. Paulos is basically unqualified because she had no reasonable assurance of financing when she certified and she has misrepresented herself in deposition testimony and in testimony before the presiding officer. BCI receives no integration credit because the applicant has failed to prove by a preponderance of the evidence that its proposed integration of Mr. Coronado would reliably be fulfilled. MMI receives only a 20% integration credit for Mr. Ocana who also receives an additional credit for his Spanish surname. But Carollo receives the grant because he has shown by a preponderance of substantial evidence that he alone will fully integrate into the business and operation of the new FM station at Sebastopol and he is a long-time resident of the service area who has been involved in significant local civic activities.

ORDER

Based on the foregoing, IT IS ORDERED that unless an appeal from this *Decision* is taken by a party, or unless the Commission reviews this *Decision* on its own motion,[45] the applications of Lucinda Felicia Paulos (File No. BPH-880518MB), Bodega Communications, Inc. (File No. BPH-880519MD), and Manzanita Media, Inc. (File No. BPH-880519NR) ARE DENIED.

IT IS FURTHER ORDERED that the application of John A. Carollo, Jr. (File No. BPH-880519MX) for authority to construct a new FM Station on Channel 229A in Sebastopol, California IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] This proceeding initially was a nineteen (19) party case. Anne M. Coffey and Dorothea E. Proctor d/b/a Purple Crayon Radio withdrew voluntarily (*Order* FCC 90M-2250, released July 30, 1990); Dennis S. Kahane withdrew voluntarily (*Order* FCC 90M-2269, released July 27, 1990); Special Delivery Broadcasting withdrew voluntarily (*Order* FCC 90M-2542, released August 16, 1990); Good Fortune Broadcasting; Sonoma County FM, Inc; Sebastopol Broadcasters, Ltd. Edward E. Baramson and Kathleen Harris were dismissed for failure to pay a hearing fee (*Order* FCC 90M-2661, released August 23, 1990); Vintage Broadcasting Corporation withdrew voluntarily (*Order* FCC 90M-3458, released November 1, 1990); Bayside Broadcasting, Inc. withdrew voluntarily (*Order* FCC 91M-384, released January 31, 1991); Dragonfly Communications, Inc. withdrew voluntarily (*Order* FCC 91M-1132, released March 28, 1991); J.M. Broadcasting, Ltd. withdrew voluntarily (*Order* FCC 91M-1270, released April 11, 1991); Wattz Broadcasting, a California general partnership withdrew voluntarily (*Order* FCC 91M-1883, released June 14, 1991); and Beth Knight was dismissed for failure to show substantial evidence of financial qualification (*MO&O* FCC 91M-3465, released December 19, 1991; *aff'd* 7 F.C.C. Rcd 1889 (Review Bd 1992), *Commission Appeal pending*. *See also* Para. 7, *infra*.

[2] The Judge declined to add issues on whether Ms. Knight misrepresented herself at a deposition, whether Knight falsely misrepresented her financial ability to construct and operate, and to determine whether she had transferred control. *Id.*

[3] The Review Board further held that the Presiding Judge could have elected to wait until the issuance of his Initial Decision before ruling on the financial issues but that the delay would have served no useful purpose here because Knight had declared that she would not adduce any evidence under the issue. *Id.* at Para. 6. The Presiding Judge applies the same logic with respect to going forward in issuing this Initial Decision notwithstanding Knight's appeal to the Commission.

[4] The first issue was an air hazard issue set against a former applicant, Leo M. Bernstein. Since Bernstein's application was dismissed the air hazard issue became moot.

[5] There is evidence in the record that she has maintained a household in the home of John Detz ("Detz"). Mr. Detz's home is in Paulos' proposed service area. (Paulos Exh. 5; Paulos, Tr. 724, 732-33.) She is employed by Detz at Station KAOI and she was a former part owner in broadcast stations once owned and controlled by Detz. But there is no evidence that Detz participated in Paulos' Sebastopol application. And Paulos testified that she now lives separately from Detz. (Paulos, Exh. 5 at 3.)

[6] Paulos asserts that she will "return and reside in Santa Rosa, California at 2685 Bardy Road." (Paulos Exh. 1 at 3 and Paulos PFC at 6.) If that is Mr. Detz's residence it is not the property of Ms. Paulos. Without evidence of some contractual right to return as a tenant, Ms. Paulos will not be credited with prior guest privileges. The fact that Paulos once worked in Maui and returned to Bardy Road is not substantial evidence that Bardy Road will be available to her again. The informal relationship between Paulos and Detz could cease at anytime. In fact, Paulos testified that in Hawaii she and Detz are now living separate and apart. (Paulos, Exh. 5 at 3.) Therefore, the Bardy Road address is too speculative to credit as a local residence to which Paulos will return.

[7] In 1980, as a direct service to the YWCA, Paulos wrote and produced public service announcements (PSA) and she solicited stations, other than her own Station KVRE, to broadcast the PSAs. (Paulos, Tr. 357-58, 445.) She admitted that it was part of her job at KVRE to prepare these programs. (Paulos, Tr. 359.)

[8] In making her record, Paulos failed to describe the nature of her volunteer work at the Hospital Chaplaincy. Because of this failure to be specific, very little credit will be awarded to that particular community activity. In a different context, Paulos seeks credit for undefined civic activities involving "concerts and benefits." Those activities are too vague to credit. (*See* Paulos PFC at 8.) Also, her "volunteer host" appearance on Station KRCB-TV in 1989 is more related to her broadcast experience since the purpose for the appearance and the program are not defined. (*Id.*)

[9] The basic legal ruling was grounded on the Commission's decision in *TeleStarInc.*, 2 F.C.C. Rcd 7352, 7353 (Comm'n 1987) (the applicant has the burden of proof). Paulos' rejected Exh. 1(b) consists of seventy (70) newspaper articles which are intrinsically unreliable hearsay sources.

[10] Ms. Paulos testified: "Prior to certifying my financial qualifications, I determined the costs of construction and operation of the station for three months without revenue. Attachment A hereto is that cost sheet which was produced in discovery in this proceeding." (Paulos Exh. 4 at 1.) That explanation does not establish whether the document was prepared at pre-certification or post-certification.

[11] This conclusion is confirmed by the findings sought by Paulos. She admits to spending most of her time from 1979 to 1988 at radio stations where she was vice-president, program director, music and promotions director, on- air personality and involved in sales. (Paulos, PFC at 15.)

[12] In deposition testimony of Paulos taken prior to the exchange of written testimony, Paulos had asserted that her estimates were based on prior discussions and dealings but the names of Freedman or Leggett were not disclosed.

[13] *See Port Huron Family Radio, Inc.*, 4 F.C.C. Rcd 2532, 2535 (Review Bd 1989).

[14] Allegations were made in the Knight petition to enlarge the issues that a Sandi Hansen had heard that Paulos and Detz had purchased the Hawaii stations as joint ventures. Knight never produced Hansen as a witness and Knight has not requested any findings based on Hansen's assertions. It is therefore found that Hansen's testimony would not have supported Knight's assertion that Paulos is an undisclosed principal in Detz's Hawaii stations. *See also* fn. 6, *supra*.

[15] Paulos has testified that the $300 purchase price was an error. She testified that she paid $1,000 for 1,000 shares. There is evidence that Paulos issued a check to VRE-II on December 31,

1988, in the amount of $1,000. (Paulos Exh. 5A.) There is no copy of the endorsement. But there is no basis to reject Paulos' explanation of the discrepancy.

[16] Charlene Claus was elected as a director and corporate secretary.

[17] Knight requests that inferences of knowledge of Detz's business matters should be drawn against Paulos because she cohabited with Detz from December 1989 to October 1990. (Paulos, Tr. 860-61.) However, to draw any such inference is not justified. There is no proof as to how much Detz told Paulos about his business or how often he discussed business matters with her. Paulos testified that she lived separately from Detz in Hawaii. (Paulos Exh. 5 at 3.) Taking at face value Paulos' assertion that she wanted no further entrepreneurial responsibilities, it is equally reasonable to conclude that Detz and the other shareholders of VRE-II did not want Paulos as a partner.

[18] The deposition was taken in San Francisco, CA on November 2, 1990. The deposition pages referred to were not offered into evidence as a marked exhibit. But the witness read the pertinent excerpts into the hearing record.

[19] Knight also sought a finding that Paulos had made substantially the same misrepresentations about Detz in her opposition to Knight's petition to add the issues concerning her alleged ownership interest in the Hawaiian stations. (Knight Exh. 8.) There Paulos corrected an error in her deposition as to Detz's service as VRE-II's registered agent. But there was nothing stated about the testimony denying Detz's involvement or employment. (Knight Exh. 8.) That erroneous statement in the prior pleading which opposed adding the issue is considered here in concluding that Paulos knew that she was misrepresenting Detz's involvement when she gave deposition testimony and that she intended to mislead all who would rely on her deposition testimony.

[20] Detz was never produced as a witness and the evidence is not conclusive as to the exact purpose for his operating VRE-II in 1989 through his front, Linda Paulos. Knight's counsel suggests that it was a scheme to hide "contributions" to VRE-II in 1989 as tax deductions. According to Mr. Tillotson's theory, when Detz purchased the company in December 1989, he would be entitled to receive the proceeds of the "Working Agreements" thereby receiving a refund of his "contributions" after getting the tax write-off. That is a speculative explanation and there are no findings made here whether or not it is accurate because there is insufficient evidence to support that finding. But the theory is not beyond the pale of possibilities based on the record made by Paulos.

[21] Coronado's deposition testimony was marked as BCI Exh. 5 and it was received in evidence for all purposes in lieu of his personal appearance for cross-examination (Tr. 880-81.) The deposition meets the requirements for signature. 47 C.F.R. §1.318(e). It was received in evidence pursuant to stipulation with no objection. (Carollo Exh. 10.) *See* 47 C.F.R. §1.321(d).

[22] There is evidence in the record indicating that BCI's counsel, Mr. Paul A. Zevnik, has made similar arrangements with CVCG involving applicants in the Round Rock, Texas proceeding and the Sacramento, CA proceeding. (Carollo Exh. 10 at 2.)

[23] Official notice is taken of the commonly known fact that California is a community property jurisdiction. FRE 201(b) and (c) and 47 C.F.R. §1.361 (Official Notice).

[24] Carollo testified: "[I]t's getting very difficult for me to get up during the night on a regular basis and it's becoming irritable to me and I think its time to stop." (Carollo, Tr. 950.) He testified on June 27, 1991, that he had plans to retire from his medical practice as of September 1991. (Carollo, Tr. 951.)

[25] It is noted that there is no staffing issue in this case. But Carollo has testified to an unusual method for conducting a broadcast business. Therefore, this evidence will be weighed on the issue of the credibility of his proposal.

[26] The system is even more refined: Where students sell advertising time the school receives a 10% override and the student will receive only 10%. Teachers and schools would share on the same basis where teachers are responsible for the sales. (Carollo, Tr. 941.)

[27] There were activities claimed for civic credit which were stricken under several bench rulings. (Tr. 887-918.) For example, credits for certain activities were broadly stated without specifics. (Tr. 904.) *Cf. Oliver Kelley*, 6 F.C.C. Rcd 7377, 7380 (Review Bd 1991) (details required to prove that applicant is entitled to a local residence credit).

[28] Ocana is employed as a manager at the Santa Rosa office of Krogen Auto Parts store. He has been employed with Krogen since 1989. His management counterparts know of his interest in applying for a broadcast license. (MMI Exh. 7 at 32-33.) There is no conflicting testimony in the record to reject Ocana's assertion that he can leave Krogen on two weeks' notice.

[29] In his hearing testimony, Kushnir described his duties as including floor sweeping, equipment and transmitter maintenance, mail fetching, telephone repairs and coffee making. (Kushnir, Tr. 1032.)

[30] No such evidence appears in Kushnir's sworn written testimony. (MMI Exhs. 3, 5.) He made reference in a deposition to Empire's "other employees" and an "operations and sales manager." *See* MMI PFC at 8. But there is no exposition of facts from which findings can be made. Nor is there evidence in the hearing record of any such "employees" or "manager" or of any plan that demonstrates how Empire can continue as an ongoing business without the full-time participation of Crew and Kushnir.

[31] The Presiding Judge had ruled that Crew could not claim a local residence preference based upon her Santa Rosa address. *Memorandum Opinion and Order*, FCC 90M-3407, released October 29, 1990.

[32] There is no specification in MMI's Exh. 4 or in MMI's PFC as to the location of the Soroptomists or the Mardi Gras Ball. Therefore, no credit will be awarded for these activities because of a failure to show relevancy to MMI's proposed service area.

[33] It is noted that MMI does not provide a citation to the evidentiary source for the findings sought in this sentence. The statement does appear in MMI 4 at 10. There is credit to be awarded for his stated service in 1988 as consultant to the Sonoma County Foundation. But there is no relevant time disclosed for his work on the Oral Review Board or with the Directors of Latinos in Communications. Therefore, no credit will be awarded for these activities because of a failure to show the proximity of the dates of those activities to the filing of the application.

[34] The stipulation was based on an affidavit of a qualified engineer who affirmed, under oath, that he reviewed the engineering sections of the respective applications, that he plotted the 60 dBu field strength contours of the three competing applicants on a single 1980 census map, and that he concluded from his review that there are no significant differences in the areas and populations proposed to be served. (Jt. Engineering Exh. 1.)

[35] These applications were filed in May 1988. Under requirements then governing financial certification, it was not necessary that an applicant have written documentation of financial ability at certification. *Northampton*, 4 F.C.C. Rcd at 5519. But reasonable assurance of costs at certification was and is the test. *See* Paulos RPFC at 8 wherein Paulos acknowledges that "back-up

documentation merely be on hand at the time of certification." Under the circumstances of Paulos' certification there was no proof that documentation existed that would establish that Paulos had a reasonable assurance of complete and accurate cost calculations.

[36] Paulos urges *Kaye-Smith* as "the lead case in this area" and inaccurately represents that it accorded "considerable weight" to the estimates of experienced broadcasters. *See* Paulos RPFC at 12 n.8. Again it is observed here that Paulos was working at VRE-I stations in programming and sales. She was not involved in activities that required a first-hand working knowledge of equipment costs. Therefore, without supporting documentations in evidence, she has failed to meet her burden of proof.

[37] A bank statement introduced in evidence by Paulos reflects a cash balance of $4,100. (Paulos Exh. 4 Att. B.) But there was an outstanding check for $1,800 to cover the FCC filing fee that must be deducted.

[38] There is no copy of the sales contract in evidence.

[39] There is evidence in the form of an admission that Paulos gifted stock valued at $80,000 to her daughter in late 1989 in order to lessen the tax consequences. Her daughter returned the shares in 1989. *See* Paulos' PFC at 10 n.15. There are no legal conclusions drawn here from these facts since they do not relate to an issue. But the transaction appears to be a wash gift transaction in different tax years effected in order for Paulos to avoid taxes. Such an engagement in a questionable tax shelter scheme does not advance Paulos' credibility.

[40] It is a common experience that substantial purchase and sale agreements of businesses may not close on time, if at all, for any variety of reasons. If Keffco did not go to closing in July 1988, an event over which Paulos had no control, there would be no funding unless the deal were later successfully renegotiated. Thus, Paulos cannot argue having had a reasonable assurance in May simply because the deal was later consummated in July. That fortuitous standard would permit certification on speculation, a standard which is totally contrary to the Commission's policy of reasonable assurance.

[41] The issue regarding Paulos' alleged undisclosed ownership interest in the Hawaiian stations implies a misrepresentation issue by virtue of the nature of an undisclosed real party-in-interest. *See Ocean Pines LPB Broadcast Corp.*, 5 F.C.C. Rcd 5821, 5826-27 (Review Bd 1990) (real party-in-interest issues viewed to inherently contain a subsumed element of deceit).

[42] There was also an example of Paulos' signature introduced into evidence. (*See* Knight Exh. 14.) But there was no expert testimony or affidavit offered to determine whether there was a forgery. Thus, no legal conclusion can be made from a comparison of Paulos' exemplar signature with the signature on the minute (Paulos Exh. 5). But it is noted that there is absolutely no similarity observed between the two signatures.

[43] The Commission recently has adopted a policy which eliminates the former presumption of spousal attribution and establishes the same attribution standards for spousal relationships that apply to attribution of media interests for other family relationships. The Commission intends to remove undue restrictions on spouses acquiring separate and independent media interests. *Clarification Of Commission Policies Regarding Spousal Attribution*, Comm'n *Slip Op.* FCC 92-60, released March 9, 1992. While the NOI is not related to comparative hearings, the above ruling in this case is consistent with current Commission policy.

[44] It is noted that the majority of his civic activities occurred in the 1960's up to the mid-1970s', which are civic experiences of a lesser value because of the passage of time. *See Newton TV, Ltd.*, 3 F.C.C. Rcd 553, 556 ¶ 11 n.15 (Review Bd 1988) (1977 activity was considered to be remote in time four years ago).

[45] This *Initial Decision* shall become effective and this proceeding shall be terminated 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 13, 1992

Released: May 22, 1992

CERTIFIED MAIL NO. P 897 383 186
RETURN RECEIPT REQUESTED

Lawrence J. Movshin,	Re: Five Notices of
Esq.	Forfeiture issued to
Attorney at Law	Clifford Electronics, Inc.
Thelen, Marrin,	on October 9-11, 1991.
Johnson & Bridges	3153602-91037
805 15th Street, N.W.	through 91041
Washington, D.C. 20005-2207	LA-91-66

Dear Mr. Movshin:

This is in response to your Petition for Reconsideration dated October 23, 1991, submitted to the Federal Communications Commission (FCC) on behalf of your client, Clifford Electronics, Inc., (Clifford) 20750 Lassan St., Chatsworth, CA 91311. You requested reconsideration of five $2,000 monetary forfeiture penalties ($10,000 in total monetary forfeiture penalties) that the FCC had imposed on Clifford. As explained below, we are affirming the five $2,000 monetary forfeiture penalties.

Our records show that in October 1990, the FCC obtained samples of radio frequency security devices that had been marketed by Clifford. Some of these devices had not been authorized by the FCC and others had an improper FCC label. On February 12 and 13, 1991, the FCC's Los Angeles Office issued five Notices of Apparent Liability for monetary forfeiture penalties to Clifford. Clifford responded in a letter dated March 11, 1991. The FCC provided additional information in a letter dated March 18, 1991, and Clifford replied on March 29, April 2 and April 3, 1991. On October 9, 10 and 11, 1991, the FCC's Los Angeles Office issued five Notices of Forfeiture to Clifford. Each Notice imposed a $2,000 monetary forfeiture penalty. The Notices stated that Clifford had (willfully) violated Sections 2.803, 2.925 and 2.926(e) of the FCC's rules and Section 302 of the Communications Act of 1934 by marketing security devices that had not been authorized by the FCC or that had improper FCC labels. 47 C.F.R. Sections 2.803, 2.925 and 2.926(e); 47 U.S.C. Section 302.

Section 302 of the Communications Act authorizes the FCC to regulate the interference potential of radio frequency devices and prohibits the marketing of devices that fail to comply with the FCC's rules. Section 2.803 of the FCC's rules prohibits the marketing of radio frequency devices that have not received FCC authorization. Sections 2.901 through 2.1065 of the FCC's rules explain the equipment authorization procedures. 47 C.F.R. Sections 2.901-2.1065. To be FCC authorized, radio frequency devices must meet technical standards designed to promote the efficient use of the radio spectrum and to minimize the possibility that these devices will cause interference to other electrical equipment. 47 C.F.R Sections 2.901, 15.105 and 15.209. Sections 2.925 and 2.926 of the FCC's rules require FCC authorized radio frequency devices to have a label and an FCC identifier code reflecting that the devices have been authorized. 47 C.F.R. Sections 2.925 and 2.926. The FCC's authority to impose monetary forfeiture penalties for violations of the Communications Act of 1934 and the FCC's rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b). Clifford has admitted most of the violations specified by the FCC in its five Notices of Forfeiture. The following is a list of the violations and Clifford's response:

FCC Notice of Forfeiture #3153602-91037

FCC ID# Clifford Used (On Clifford Model)	Violation	Clifford's Response
CZ57RRPROXSR	Not FCC	Admits violation.
(Proximity sensor)	Authorized	Letters, March 29 (p.2); April 2 (p.4)
CZ57RRIIIR (III Alarm Module)	Not FCC Authorized	Appears to admit violation. Letters, March 11 (p.2); March 29 (p.3); April 2 (p.4).
CZ57RRMODSE (Special Edition 3000) Alarm Module)	Mislabeled	Admits violation. Letters, March 11 (p.2); March 29 (p.2).

FCC Notice of Forfeiture #3153602-91038

CZ57RRLP1-2M (Alarm Transmitter)	Mislabeled	Admits violation. Letters, March 11 (p.1); March 29 (p.3); April 2 (p.4).

FCC Notice of Forfeiture #3153602-91040

CZ57RRCS3RC (Special Edition 2020) (Delta III) (Intelliguard 300)	Mislabeled three models	Admits violation. Letters, March 11 (p.2); March 29 (p.4); April 2 (p.4).

FCC Notice of Forfeiture #3153602-91041

CZ57RRIG500 (Ace) (Intelliguard 600)	Mislabeled two models	Admits violation. Letters, March 11 (p.2); March 29 (p.4); Apr. 2 (p.4).

The only violation that Clifford did not admit in its correspondence involved FCC Notice of Forfeiture number 3153602-91039. In this Notice, the FCC charged Clifford with marketing an alarm transmitter with an improper FCC identifier code on the label (label showed FCC identifier code CZ57RRC2BT instead of correct code CZ57RRDBT). Clifford responded that the transmitter with the C2BT label was based on a transmitter that had been authorized by the FCC to use the C2BT label and

that there were only minor differences between the two transmitters. Clifford states that it had only moved "the locations of a few components" and that "We do not believe that a single component was added to the device." Thus, Clifford claims that it was proper for it to use the C2BT identifier code on a transmitter that had only been slightly altered from the C2BT transmitter. (March 29 letter, p.3-4.)

The two transmitters, however, are completely different, and this is a clear case of using an incorrect FCC identifier code. The C2BT transmitter was authorized to use circuit boards 74-252 rev. A and 74-531 rev. E. The transmitter that Clifford incorrectly labeled C2BT was authorized by the FCC to use circuit boards 74-306 A and 74-307 A under the FCC identifier code DBT. Although the C2BT and DBT transmitters have some common elements, they use completely different circuit boards and are completely different transmitters. The FCC identifier codes, therefore, are not interchangeable between the transmitters. It is believed that during a meeting between Clifford and the FCC's staff, Clifford acknowledged its error.

Clifford's Petition for Reconsideration states several reasons why the monetary forfeiture penalties should not be imposed. Clifford states that it did not willfully commit a violation since the violations were not the result of a "company policy to...violate the rules," but instead "was the result of inadvertent and clearly unintentional breakdowns in Clifford's quality control procedures, traceable to a single manager."

A willful violation was charged because the marketing of the security devices by Clifford was willful based on the definition of this word in Section 312(f)(1) of the Communications Act of 1934. 47 U.S.C. Section 312(f)(1). Section 312(f)(1) defines "willful" as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." This definition was intended by Congress to apply to the word willful as used in Section 503 of the Communications Act to assess forfeiture penalties, and to be consistent with the FCC's decision in *Midwest Radio-Television Inc.*, 45 FCC 1137 (1963). H.R. CONF. REP. NO. 97-765, 97th Cong., 2d Session (1982), *reprinted in* 1982 U.S. CODE CONG & ADMIN. NEWS 2294-95. Based on the *Midwest Radio-Television* decision, willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question as opposed to being accidental (such as brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. In addition, one of the main policy factors guiding the FCC in imposing forfeitures has been whether a willful act demonstrated lack of concern, indifference or laxity regarding compliance with the FCC's rules. *Midwest Radio-Television, Inc.*, 45 FCC at 1141-42.

As applied to Clifford, there was a willful violation of the FCC's rules since Clifford "consciously and deliberately" marketed radio frequency devices that violated the FCC's rules regardless of whether Clifford was aware of the violation. The FCC is especially concerned regarding this violation since it appeared to result from at least an indifference or laxity regarding compliance with the FCC's rules. Clifford obviously was aware that FCC labels with FCC identifier codes were required on its products, but failed in some cases to obtain the necessary FCC authorization that the labels are intended to represent prior to placing labels on products, and in other cases placed incorrect labels on products that had been authorized by the FCC. The Commission stated in *Standard Communications Corporation*, that the claim that a rule violation "constitutes no more than a technical or a clerical error...implies the type of indifference to Commission Rules that justifies the imposition of forfeitures....Employee acts or omissions, such as clerical errors..., do not excuse violations." 1 FCC Rcd. 358 (1986). Furthermore, the Commission has long held companies responsible for violations of the FCC's rules committed by their employees. *E.g., Review of Liability of MTD*, 6 FCC Rcd. 34; 68 RR2d 989 (1991). Clifford also states that monetary forfeiture penalties should not be imposed since it cooperated with the FCC to resolve the problem and took prompt corrective action. However, persons subject to the FCC's rules are expected to cooperate with the FCC to bring their conduct into compliance with the rules. Subsequent remedial action does not nullify a forfeiture penalty. *Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corporation*, 3 FCC2d 699, 700 (1966).

Clifford further indicates that it should not be subject to monetary forfeiture penalties since most of its products were authorized by the FCC, but had been merely mislabeled. The FCC's rules require the proper labeling of FCC authorized devices and the use of specified FCC identifier codes on the label. 47 C.F.R. Section 2.925 and 2.926. Section 503(b) of the Communications Act of 1934 authorized the FCC to impose monetary forfeiture penalties when its rules are violated. 47 U.S.C. Section 503(b). It is the FCC's policy to impose monetary forfeiture penalties when its labeling and identifier code rules are violated.

Finally, Clifford states that the total value of the monetary forfeiture penalties, namely, $10,000 is too high. At the time of the violations, it was the FCC's usual policy to impose a $2,000 monetary forfeiture penalty for each violation of its rules regarding the marketing of radio frequency devices that had not been authorized by the FCC. It was also the usual policy to assess a $750 penalty for each violation of its labeling rules. The dollar value of these monetary forfeiture penalties are authorized by Section 503(b) of the Communications Act.

Five Notices of Forfeiture were issued to Clifford and each Notice imposed a $2,000 monetary forfeiture penalty. Some Notices involved multiple violations of the FCC's rules and others cited only a single violation of the FCC's labeling rules. It is uncertain whether there was any logic concerning how violations were organized in the different Notices of Forfeiture. However, the FCC office issuing the Notices considered the violations to be especially flagrant and pervasive, and, therefore, worthy of monetary forfeiture penalties that exceeded the amounts usually imposed by the FCC for similar violations. Some Notices impose a penalty that is greater than the FCC customarily imposed for the same type of violation, although the penalty is within the limits authorized by Section 503(b) of the Communications Act. Other Notices impose a penalty that is less than the FCC would usually impose at this time as the cumulative penalty for each individual violation listed in the Notice.

We note, moreover, that Clifford was cited for marketing two devices that lacked FCC authorization. The FCC's usual policy, as previously explained, would be to impose a $2,000 penalty for each of these devices, or a total penalty of $4,000. Clifford was further cited for marketing eight devices with improper labels and the FCC would

usually impose a $750 penalty for each device, or a total penalty of $6,000. Thus, the penalty that the FCC would customarily assess for all of these violations would be $10,000. Since this amount is identical with the total monetary forfeiture penalty imposed on Clifford, it is affirmed. It should also be noted that the FCC recently substantially increased its monetary forfeiture penalties and the figures stated above as customary penalties no longer apply. *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*.

Please request your client to submit five $2,000 monetary forfeiture payments within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. One check should have the number 3153602-91037 placed on it, the second check the number 3153602-91038, the third check the number 3153602-91039, the fourth check the number 3153602-91040, and the fifth check the number 3153602-91041. The five checks should be sent to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Clifford Electronics
Attention: Mr. Vernon McDonald
Executive Vice President
20750 Lassan Street
Chatsworth, California 91311

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 13, 1992

Released: May 22, 1992

CERTIFIED MAIL NO. P 295 670 780
RETURN RECEIPT REQUESTED

Western States Broadcasting
12550 Brookhurst Street, #A
Garden Grove, California 92640

Re: Notice of Forfeiture issued to Western States Broadcasting (Station KCHQ-FM) on August 27, 1991.
3153502-91010
PO-910091

Attention: William L. Zawila
President

Dear Western States Broadcasting:

This is in response to your letter dated September 25, 1991, to the Federal Communications Commission's (FCC) Portland, Oregon Office. You requested that a $1,000 monetary forfeiture penalty that had been imposed on Western States Broadcasting by the FCC's Portland Office "be reviewed by the Commission in Washington, D.C."

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, we are affirming the $1,000 penalty.

Our records show that on May 29, 1991, the FCC became aware that Western States Broadcasting was operating an unauthorized FM broadcast booster station in conjunction with its licensed broadcast station KCHQ-FM, and that the authorized transmitter for this station was operating at reduced power. On June 25, 1991, an FCC engineer inspected the authorized transmitter site of broadcast station KCHQ-FM on top of Buck Butte, approximately 9.4 kilometers N.N.W. from Malin City, Oregon, which is licensed by the FCC to operate at 60 kilowatts ERP. The FCC engineer estimated that the transmitter was operating with reduced power of approximately 30 watts output power. Later evidence provided by the station's engineer indicates that the transmitter's output power was as low as 10 watts, and that the calculated ERP was 32.3 watts. The FCC engineer also determined by close-in direction finding that KCHQ-FM was transmitting on 101.3 MHz from a location approximately 650 feet north of the intersection of Loma Linda Drive and Linda Vista Drive, Klamath Falls, Oregon. On June 26, the FCC engineer inspected this site and found that KCHQ-FM was operating an FM broadcast booster station with approximately 70 watts transmitter output power. This booster station was not authorized by the FCC.

On July 23, 1991, the FCC's Portland Office issued a Notice of Apparent Liability for a Monetary Forfeiture Penalty to Western States Broadcasting for willfully violating its FCC station authorization (license) and Section 73.1560(d) of the FCC's rules. 47 C.F.R. Section 73.1560(d). Broadcast booster stations are required to be authorized by the FCC. 47 U.S.C. Section 301, 47 C.F.R. Section 74.1232(e) and (f). Furthermore, Section 73.1560(d) of the FCC's rules requires licensees to inform the FCC within 10 days if they are operating at reduced power. Western States Broadcasting responded on August 22, 1991. On August 27, the FCC's Portland Office issued a Notice of Forfeiture for a $1,000 monetary forfeiture penalty to Western States Broadcasting. The FCC's authority to impose monetary forfeiture penalties for violations of its licenses and rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

Western States Broadcasting in its letters to the FCC states several reasons why the monetary forfeiture penalty should not be imposed. First, Western States Broadcasting explains that the booster was operating "at low power levels . . . within the authorized primary coverage of KCHQ(FM)" as an experiment to help in "the preparation of the FM Booster Station Application" and this experimentation was authorized "under the provisions of Commission Rule 73.1615." The FCC's Notice of Forfeiture correctly replied that "This rule applies to stations that are modifying their facilities as authorized by a construction permit for such modification. Since the booster station was not a factor in KCHQ's original construction permit, this cannot be considered experimental operation under 73.1615." Thus, it was proper for the FCC to impose a monetary forfeiture penalty for the unauthorized booster, and the dollar value of the penalty usually imposed by the FCC at this time for this violation was $1,000, which is the amount assessed in the Notice of Forfeiture.

Second, Western States Broadcasting states that the penalty should not be imposed since it took corrective action such as terminating the operation of the booster on June 30 and subsequently submitting the necessary applications to the FCC. However, remedial action, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC2d 699, 700 (1966).

Third, Western States Broadcasting explains that it did not violate Section 73.1560(d) of the FCC's rules since "the Commission was notified in Washington, D.C., by letter from this office regarding the reduced power operation of KCHQ(FM)." The FCC's Portland Office responded to this in a letter to Western States Broadcasting, dated October 4, 1991, that requested a copy of this notification. Western States Broadcasting did not respond.

If this notification was sent to the FCC in Washington, D.C., the most likely place where it would have been filed would have been in the FCC's file for station KCHQ-FM. This file has been checked and there is no notification, although it is possible that it could have been filed elsewhere. Nevertheless, based on the information available to the FCC, it appears that the FCC was not notified by Western States Broadcasting before the FCC inspected KCHQ-FM that the station was operating at reduced power. Furthermore, this issue is not relevant to the amount of the monetary forfeiture penalty imposed on Western States Broadcasting since, as stated above, the $1,000 monetary forfeiture penalty was justified by the violation involving the unauthorized booster station.

Please submit the $1,000 monetary forfeiture payment within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. Please place the number 3153502-91010 on the check and send it to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 15, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PETITION FILED BY THE NATIONAL ASSOCIATION FOR INFORMATION SERVICES AND OTHERS FOR A DECLARATORY RULING THAT THE COMMISSION HAS EXCLUSIVE JURISDICTION OVER INTERSTATE 900 NUMBER SERVICES

On April 23, 1992, the National Association for Information Services; Audio Communications, Inc.; and Ryder Communications, Inc. together petitioned the Commission for a declaratory ruling that the Commission has exclusive jurisdiction over interstate 900 and 900-type pay-per-call services. The petition was filed in response to regulations adopted by the South Carolina Public Service Commission that would require the telephone company to block business and residential access to 900 number services unless the customer requests otherwise pursuant to a prescribed balloting process. Petitioners state that the regulations will become effective upon approval of the South Carolina General Assembly, or within 120 legislative days if not disapproved by the General Assembly. Petitioners argue that the vast majority of calls that could be blocked as a result of the regulations are interstate. According to petitioners, prevailing technology does not allow telephone companies to block intrastate 900 number services only. The petitioners further argue that the South Carolina regulations are in conflict with Commission regulations that permit blocking of individual 900 number access pursuant to a customer request.

Interested parties should file comments on this petition by **June 15, 1992,** and reply comments by **July 15, 1992,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should be sent to Peggy Reitzel, Common Carrier Bureau, Federal Communications Commission, 1919 M Street, N.W., Washington, DC 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, DC 20036. The petition is, and copies of the comments and reply comments will be when filed, available for inspection and photoduplication in Room 544, 1919 M Street, N.W., Washington, DC 20554. Copies may be additionally obtained from Downtown Copy Center at (202) 452-1422.

For further information contact Michael Carowitz at (202) 632-6363 or Peggy Reitzel at (202) 632-4047, Policy and Program Planning Division, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

THE TELLESIS PARTNERS — File No. 10231-CL-P-580-A-88

Permittee of Station KNKN285
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the North Dakota 1-
Divide, RSA (No. 580)

MOUNTAIN VIEW CELLULAR PARTNERS — File No. 10071-CL-P-393-A-88

Permittee of Station KNKN306
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the Idaho 6- Clark, RSA (No. 393)

MOJAVE CELLULAR PARTNERS — File No. 10150-CL-P-528-A-88

Permittee of Station KNKN431
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the Montana 6- Deer
Lodge, RSA (No. 528)

DELTA CELLULAR PARTNERS — File No. 10234-CL-P-583-A-88

Permittee of Station KNKN343
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the North Dakota 4-
McKenzie, RSA (No. 583)

SIERRA CELLULAR PARTNERS — File No. 10456-CL-P-516-A-89

Permittee of Station KNKN378
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the Missouri 13-
Washington, RSA (No. 516)

ORDER

Adopted: May 18, 1992; Released: May 22, 1992

By the Deputy Chief, Common Carrier Bureau:

1. In April, 1990, pleadings were filed by Optima Cellular Partnership (Optima) alleging certain rule violations by Overland Cellular Partners (formerly The Tellesis Partners), Mountain View Cellular Partners, Montana 6 Corporation (formerly Mojave Cellular Partners), Delta Cellular Partners and Sierra Cellular Partners. The Committee for a Fair Lottery filed a letter challenging the qualifications of Overland Cellular Partners. After evaluating the allegations and the responses filed by the permittees, who are now licensees, the Common Carrier Bureau initiated an investigation into the allegations. The participation of Optima and the Committee was terminated by order of the Mobile Services Division (DA 91-609, released May 23, 1991).

2. The Bureau, the above-captioned permittees (now licensees), and Kendall W. Marks, Jr., (who is a principal of Mountain View Cellular Partners) have reached an agreement which would terminate the Bureau's investigation. The terms and conditions of this agreement are contained in the attached Consent Decree.

3. We have reviewed the terms of the Consent Decree and evaluated the circumstances of this case. We believe that the public interest would be served by approving the Consent Decree, the terms of which are incorporated herein by reference.

4. Accordingly, IT IS ORDERED that the Bureau's investigation into the qualifications of the liceensees is TERMINATED.

5. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

ATTACHMENT

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

THE TELLESIS PARTNERS File No. 10231-CL-P-580-A-88

Permittee of Station KNKN285
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the North Dakota 1-
Divide, RSA (No. 580)

MOUNTAIN VIEW CELLULAR PARTNERS File No. 10071-CL-P-393-A-88

Permittee of Station KNKN306
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
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MOJAVE CELLULAR PARTNERS File No. 10150-CL-P-528-A-88

Permittee of Station KNKN431
operating on
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SIERRA CELLULAR PARTNERS File No. 10456-CL-P-516-A-89

Permittee of Station KNKN378
operating on
frequency Block A in the Domestic
Public Cellular Radio
Telecommunications Service to
serve the Missouri 13-
Washington, RSA (No.516)

CONSENT DECREE

I. INTRODUCTION

1. This is a Consent Decree between the Chief of the Common Carrier Bureau and Overland Cellular Partners (formerly the Tellesis Partners and referred to herein as "Tellesis"), Mountain View Cellular Partners ("Mountain View"), Montana 6 Corporation (pro forma assignee of Mojave Cellular Partners) and Mojave Cellular Partners (referred to herein collectively as "Mojave"), Delta Cellular Partners ("Delta"), Sierra Cellular Partners ("Sierra") and Kendall W. Marks, Jr. Pursuant to this Consent Decree the Bureau terminates its informal investigation of the above-captioned permittees (who are now licensees and will be referred to as such).

2. In April 1990, pleadings were filed seeking the institution of revocation proceedings with regard to the licensees. After analyzing those pleadings and the responses filed by the licensees the Bureau concluded that additional information was needed and an informal investigation was begun. During the course of the investigation the Bureau requested the licensees to submit documents relating to the issues that had been raised by the pleadings. The Bureau also questioned Mr. Kendall W. Marks, Jr., the managing partner of Mountain View. Under the terms of this Consent Decree the licensees and Mr. Marks will make payments totalling $350,000 for deposit into the United States Treasury and the Bureau terminates its investigation of the licensees. In addition, Mr. Marks has agreed to certain restrictions on his future FCC related conduct.

II. BACKGROUND

3. The April 1990 pleadings were filed by Optima Cellular Partnership (Optima), who sought revocation of the construction permits and by The Committee for a Fair Lottery (the Committee) who submitted a letter seeking reconsideration of a grant of an application wherein Tellesis was seeking authority to assign its permit. Optima had also challenged other applications in which the above captioned licensees sought Commission consent to an assignment of their permits as well as two construction permit applications (one filed by Delta). All the assignment applications that had been challenged by Optima and the Committee have been withdrawn and the two construction permit applications that had been challenged by Optima have been dismissed. By an *Order* released May 23, 1991, DA 91-609, the Mobile Services Division terminated the participation of Optima and the Committee in the informal investigation.

4. In their initial and subsequent filings, Optima and the Committee alleged, *inter alia*, that (1) there were undisclosed real parties in interest behind these licensees, (2) some of the partners were not United States citizens, and (3) the licensees had alienated ownership interests while their applications had been pending. If these allegations were true the licensees would have been in violation of various provisions of the Commission's Rules and the Communications Act. The licensees have at all times denied these allegations.

5. During the course of the investigation, the licensees submitted voluminous documents responding to the staff's request for "all books and records relating" to their respective RSA applications. Mr. Marks submitted numerous documents in response to the staff's request to him for "all documents relating to the filing of RSA applications . . . ." In addition, Mr. Marks was questioned under oath for two days. The Bureau has reviewed all the facts and circumstances surrounding the allegations raised against the licensees and has examined the material produced by the licensees and Mr. Marks.

III. DEFINITIONS

6. For the purposes of this Consent Decree, the following definitions apply:

(a) "Parties" means Overland Cellular Partners (formerly The Tellesis Partners), Mountain View Cellular Partners, Montana 6 Corporation and Mojave Cellular Partners, Delta Cellular Partners, Sierra Cellular Partners, and Kendall W. Marks, Jr.

(b) "Order" means an order of the Bureau adopting the terms and conditions of this Consent Decree.

(c) A "Final Order" means an Order of the Bureau that is no longer appealable or subject to administrative or judicial reconsideration, review, appeal or stay.

IV. AGREEMENT

7. The parties admit the jurisdiction of the Commission over them and over the subject matter of this action for the purposes of this Consent Decree and the Order described in paragraph 6(b).

8. The parties agree that upon signing by the Bureau and the parties, the provisions of this Consent Decree shall be incorporated by reference in the Order described in paragraph 6(b) formally adopting this Consent Decree and terminating the informal investigation.

9. The parties waive any rights they may have to appeal the Order described in paragraph 6(b).

10. In consideration for the Bureau's entering into this Consent Decree, and in order to avoid any disruption of service to the public, conserve Commission resources and in order to avoid litigation costs, the parties agree to the following terms:

(a) The licensees will make payments to the United States Treasury totalling $300,000. Kendall W. Marks, Jr., who will not participate in the payment due from Mountain View, will make a $50,000 payment to the United States Treasuury. The amounts to be paid by each licensee and the percent of the $300,000 total are -

	Amount	Percentage
Mountain View	$152,000	50.67
Sierra	$ 70,000	23.34
Delta	$ 28,000	9.33
Tellesis	$ 25,000	8.33
Mojave	$ 25,000	8.33

(b) The payments will be made on the following schedule:

Amount	Date
$25,000	Within 30 days after the Order entering this Consent Decree becomes a Final Order.
$50,000	Within 6 months after first payment is due.
$100,000	Within 6 months after second payment is due.
$125,000	Within 6 months after third payment is due.

(c) When payments are made, each licensee shall pay its appropriate share according to the percentages set forth above. The failure of a licensee to comply with the terms of this payment schedule will be considered to be a failure of compliance by that licensee and will not affect the terms of this Consent Decree as they apply to the other licensees.

(d) Mr. Kendall W. Marks, Jr., will make a payment to the U.S. Treasury in the amount of $50,000 within 18 months after the first payment is due from the licensees. A failure of Mr. Marks to pay this amount to the U.S. Treasury will be considered to be a failure by Mr. Marks and Mountain View to comply with the terms of this Consent Decree and the Commission may hold Mountain View responsible for the amount due from Mr. Marks.

(e) The due dates of these payments will be modified only upon a showing of good cause demonstrating why a payment cannot be made on schedule. In the event of a sale of some or all of a licensee's interest in an authorization requiring Commission approval, the transfer or assignment agreements will specifically provide that proceeds from the sale shall be used to make payments to the United States Treasury to the extent that proceeds from the sale are sufficient to cover the unpaid amounts owed by that licensee and that such payments shall be made at closing. A copy of any such agreement shall be made available to the Common Carrier Bureau. If a transfer or assignment application is filed by a licensee with terms specifying that the proceeds shall be used to satisfy the entire amount still due the United States Treasury, no further payments need be made by that licensee until closing. In no event, however shall payments be held in abeyance for more than 90 days after an order approving the transfer or assignment becomes a Final Order. If the transfer or assignment is denied or if the application for approval of the transfer or assignment is withdrawn prior to any initial staff or Commission action on the ap-

plication, the payment schedule shall resume on the 30th day after denial of the transfer or assignment by the Commission becomes a Final Order or withdrawal of the application. If, however, the application has been withdrawn because a Final Order approving it has not been issued before the expiration date of the underlying transaction and the proposed purchaser refuses to extend the existing agreement, the payment schedule shall resume on the 120th day after withdrawal of the application. Unless otherwise found not to serve the public interest, any Commission authorization permitting the transfer or assignment will be conditioned upon compliance with this paragraph. If a licensee elects to raise funds for the payments from among its own partners and this results in transfers as between the partners, the Commission will favorably consider waiving Section 22.922 of its rules to allow the alienation of interest as that rule would apply to that licensee's pending RSA construction permit applications.

(f) In the case of Mr. Marks, his payment is due pursuant to the schedule unless he has transfered a total of 25% of his interest in the Mountain View Idaho 6 authorization prior to that time. In that event payment shall be due at the time he has received payment for at least 25% of his interest. Also, the time for his payment will be extended if, at the time the payment would otherwise be due pursuant to the schedule, he has entered into an agreement to sell his interest in the license (apart from a sale by Mountain View which includes his interest) and the agreement provides for payment to be made out of the proceeds due him. In that event, payment shall be due at the time he receives the proceeds but in no event later than 90 days after the date provided for by the schedule. If Mr. Marks is to receive proceeds from the sale of 50.01% or more of the Mountain View Idaho 6 authorization, his payment shall be made on the due date for the last Mountain View payment and the transactional documents shall so provide.

(g) In addition to making the payment described above, from the date this Order becomes a Final Order, Kendall W. Marks, Jr., will:

1. Not vote his ownership interest in Mountain View except on matters relating to the Consent Decree or the sale (or partial sale), assignment or transfer of interests in the Mountain View Idaho 6 permit.

2. Resign his positions as Managing Partner and member of the Executive Committee of Mountain View within 10 days.

3. Relinquish his rights to his ownership interest in any still pending Mountain View RSA applications by transferring those interests within 30 days to the remaining partners in proportion to their current ownership and for no consideration. The Commission will favorably consider waiving Section 22.922 to permit this transaction.

4. Not be a party to any application filed with the Commission for five years.

(h) Also, Kendall W. Marks, Jr., will sell his entire ownership interest in Mountain View's Idaho 6 authorization no later than when Mountain View sells 50.01% or more of its interest in that authorization. In any sale of his interest in Mountain View's Idaho 6 authorization, Mr. Marks shall receive no more than 75% of the amount he was to receive from the assignment of the Idaho 6 construction permit approved by the Commission on April 10, 1990 (Report No. CL-90-151). Any amount in excess of the "cap" will be paid to the United States Treasury by Mr. Marks. This would be in addition to the $50,000 payment by Mr. Marks previously provided for in this Consent Decree. At the time of the sale of his interest, Mr. Marks will make a showing to the Bureau to demonstrate whether additional payments to the Treasury are to be made.

11. In light of the covenants and representations contained in paragraph 10, *supra*, and in express reliance thereon, the Bureau will terminate its investigation of the licensees. Such termination is without a finding by the Bureau of wrongdoing by the parties. In the future, the Bureau will not institute, on its own motion, any proceedings based on either the allegations raised by Optima or the Committee or the information obtained during the investigation against any of the parties. The Bureau will not conduct further proceedings of any kind based on the matters raised or investigated herein unless information beyond that made available in this proceeding and which warrants inquiry is presented.

12. The parties agree that any violation of the Order or this Consent Decree shall constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order against the party in violation. Any violation by Mr. Marks shall be considered to be a violation by Mr. Marks and by Mountain View.

13. If the Consent Decree is not signed by the Bureau and each of the parties, or is otherwise rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any fashion in a legal proceeding.

14. If the Commission, or the United States on behalf of the Commission, brings an action in the United States District Court to enforce the terms of the Order, the parties agree that they will not contest the validity of the Order, will waive any statutory right to a trial *de novo* and will consent to a judgment incorporating the terms of this Consent Decree.

_____

For the Common Carrier Bureau

_____

For Mountain View Cellular Partners

_____

For Overland Cellular Partners (Tellesis)

_____

For Montana 6 Corporation (Mojave) and Mojave Cellular Partners

For Delta Cellular Partners

For Sierra Cellular Partners

Kendall W. Marks, Jr.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-271

In the Matter of

Amendment of Section 73.202(b),	RM-7426
Table of Allotments,	RM-7580
FM Broadcast Stations.	RM-7666
(Brownstown, Cannelton	RM-7712
and Edinburgh, Indiana;	RM-7891
Beaver Dam, Campbellsville,	RM-7892
Horse Cave and	RM-7893
Munfordville, Kentucky;	
Carthage, and Lafayette,	
Tennessee)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 6 FCC Rcd 5534 (1991), seeking comments on four separately filed, interrelated petitions for rule making. Two of the petitions request new allotments and two petitions request modifications of existing allotments. William C. Potter ("Potter") requested the allotment of Channel 275A to Brownstown, Indiana, as that community's first local aural broadcast service (RM-7426). Hancock Communications, Inc. ("Hancock"), licensee of Station WKCM-FM, Channel 275A, Cannelton, Indiana, requested the substitution of Channel 275C3 for Channel 275A at Cannelton and the modification of the permit for Station WKCM-FM accordingly (RM-7580). To accommodate its proposal, Hancock also requested the substitution of Channel 264A for Channel 274A at Beaver Dam, Kentucky, and modification of the construction permit issued to Beaver Dam Broadcasting ("BDB") for Station WVPV(FM),[1] as well as the substitution of Channel 294A for Channel 264A at Horse Cave, Kentucky, for which a construction permit has been issued to James B. Myers, III ("Myers") for Station WLMK(FM) (File No. BPH-891012NI).[2] Mary L. Rothrock ("Rothrock") requested the allotment of Channel 275A to Edinburgh, Indiana, as that community's first local aural broadcast service (RM-7666). Finally, Heartland Communications, Inc. ("Heartland"), licensee of Station WCKQ(FM), Channel 281A, Campbellsville, Kentucky, requested the substitution of Channel 281C3 for Channel 281A at Campbellsville and the modification of its license of Station WCKQ(FM) accordingly (RM-7712).[3] Heartland also requested the substitution of Channel 294A for Channel 272A at Munfordville, Kentucky, and modification of the license for Station WLOC-FM; the substitution of Channel 281A for Channel 272A at Carthage, Tennessee, and modification of the license of Station WUCZ(FM); and the substitution of Channel 272A for vacant Channel 281A at Lafayette, Tennessee. [4]

2. As indicated in the *Notice*, Potter's proposal for Channel 275A at Brownstown is mutually exclusive with Hancock's proposal for 275C3 at Cannelton. The distance between the two communities is 124.1 kilometers (77 miles) whereas 142 kilometers (88 miles) is required between Class A and C3 co-channel allotments. Nor is Potter's proposal compatible with Rothrock's proposal to allot Channel 275A to Edinburgh. The communities are located 44.5 kilometers apart whereas 115 kilometers (71 miles) is required in this instance. The Edinburgh and Cannelton proposals are compatible. The *Notice* advised that unless alternate channels could be found, the Brownstown proposal would be considered comparatively with the Cannelton and Edinburgh proposals.

3. Further, the *Notice* stated that the Cannelton and Campbellsville proposals are mutually exclusive insofar as Hancock requests the substitution of Channel 294A at Horse Cave to accommodate its proposal at Cannelton, and Heartland requests the substitution of Channel 294A at Munfordville to accommodate the Campbellsville proposal. The distance between Horse Cave and Munfordville is 8.0 kilometers (5 miles), while 115 kilometers (71 miles) is required between Class A co-channels. The Campbellsville proposal is compatible with either the Brownstown or Edinburgh, Indiana, proposals.

4. Therefore, the *Notice* set forth the four proposals in two options, as follows:

---

[1] As indicated in the *Notice*, the Beaver Dam, Kentucky, substitution would require a relocation of the transmitter for Station WVPV(FM). In recognition of the Commission's policy regarding the involuntary relocation of an authorized transmitter, Hancock submitted a copy of an agreement with Beaver Dam Broadcasting indicating its consent to the requested changes for proposed Station WVPV(FM), provided it is reimbursed for the reasonable and prudent costs related to the changes.

[2] At the time this proposal was filed, Myers and Royse Radio, Incorporated (File No. BPH-891011MB) were applicants for Channel 264A at Horse Cave. A copy of the *Notice* was served on the applicants.

[3] As indicated in the *Notice*, Heartland is currently operating on Channel 280A at Campbellsville. However, its license was modified to specify operation on Channel 281A in MM Docket No. 88-215. *See Second Report and Order*, 4 FCC Rcd 8749 (1989). A construction permit has been issued to Heartland for Station WCKQ(FM) on Channel 281A (File No. BPH-910701IE).

[4] Heartland filed a petition for reconsideration of the *Report and Order* in MM Docket No. 89-570, 6 FCC Rcd 3289 (1989), which allotted Channel 281A to Lafayette. The *Notice* in this proceeding advised that Heartland's proposal would be considered dependent upon the resolution of its reconsideration request in MM Docket No. 89-570. Heartland's reconsideration was dismissed in an action adopted simultaneously with this proceeding. *See Memorandum Opinion and Order* (MM Docket No. 89-570), 7 FCC Rcd _____ (adopted May 14, 1992).

OPTION I

City	Channel No. Present	Proposed
Brownstown, Indiana	--	275A
	or	
Edinburgh, Indiana	--	275A
	and	
Campbellsville, Kentucky	260A, 281A	260A, 281C3
Munfordville, Kentucky	272A	294A
Carthage, Tennessee	272A	281A
Lafayette, Tennessee	281A	272A

OPTION II

Edinburgh, Indiana	--	275A
Cannelton, Indiana	275A	275C3
Beaver Dam, Kentucky	274A	264A
Horse Cave, Kentucky	264A	294A

5. All parties filed comments in response to the *Notice*. Supporting comments were also filed by Wood Broadcasting, Inc., licensee of Station WUCZ(FM), Channel 272A, Carthage, Tennessee. Opposing comments were filed by Myers. Counterproposals were filed by Heartland, Hancock, and Montgomery Broadcasting Company ("Montgomery"),[5] licensee of Station WQZQ-FM, Dickson, Tennessee,[6] as well as by Potter,[7] and by DuBois County Broadcasting ("DCB"), licensee of Station WBDC, Channel 265A, Huntingburg, Indiana.[8]

Comments

6. Rothrock comments that Edinburgh's population is greater than Brownstown (pop. 2,872)[9] and urges that her proposal should be preferred. Rothrock reiterated her intention to apply for Channel 275A if allotted to Edinburgh, as requested.

7. Heartland's comments propose to resolve the conflict between its proposal at Campbellsville, Kentucky, and Hancock's proposal at Cannelton, Indiana, by substituting Channel 273A at Horse Cave, Kentucky, instead of Channel 294A as proposed in the *Notice*, to permit the substitution of Channel 294A at Munfordville to accommodate its proposal. Based on its belief that its revised allotment plan would remove the conflict between Option I and II of the *Notice*, Heartland requests severance of its proposal since it is not a necessary party to the comparative analysis of the Brownstown and Edinburgh proposals.[10]

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[5] The Heartland, Hancock and Montgomery counterproposals were placed on Public Notice (Report No. 1872, January 28, 1992; corrected February 4, 1992) (RM-7891, RM-7892, and RM-7893, respectively).

[6] Montgomery advises that it is wholly owned by the same individual who owns Hancock Communications, Inc., licensee of Station WKCM-FM, Cannelton, Indiana.

[7] Potter counterproposed the allotment of Channel 275A to Brownstown Township, Indiana, rather than Brownstown, without altering the reference coordinates specified for Brownstown in the *Notice*. Potter asserts that Brownstown Township's 1990 United States Census population of 4,963 represents a 6.7% increase over its 1980 population of 4,650. Conversely, Potter claims that Edinburgh's 1990 population (4,536), represents a 6.6% decline from its 1980 population of 4,856. Thus, Potter urges that since Brownstown Township is larger, but receives fewer radio services than Edinburgh, his proposal should be preferred.

The Commission allots channels to communities, and not to townships. We find no justification for further considering Potter's proposal for Brownstown Township. *See Trade, TN*, 6 FCC Rcd 5835 (1991). In view of our determination, discussion of the remaining parties' comments related to Potter's alternate proposal is unnecessary. However, we will consider Potter's comments as reiterating an interest in pursuing an allotment to Brownstown since the reference coordinates for Brownstown Township do not vary from those given for his original proposal. Additionally, we note that Potter stated in his comments that, assuming his proposal prevails, "Upon the conclusion of this proceeding and opening of the filing window for Channel 275A at *Brownstown*, [he] will prepare and file an application for a construction permit" (emphasis supplied). Therefore, the Brownstown and Edinburgh proposals will be comparatively considered pursuant to our allotment priorities. *See* 90 FCC 2d 88 (1982).

[8] DuBois seeks a change in the reference coordinates for the proposed allotment of Channel 264A at Beaver Dam, Kentucky. DuBois had requested the substitution of Channel 265B1 for Channel 265A at Huntington, and modification of its authorization accordingly, in MM Docket No. 88-315, 6 FCC Rcd 6473 (1991). DuBois claims that a change in the Beaver Dam reference coordinates would permit it to specify a preferred site location for its Channel 265B1 modification request, based upon FAA constraints at its proposed site. At the time DuBois' comments were filed, its modification request was under consideration in a comparative proceeding in MM Docket No. 88-315. DuBois' modification request was subsequently granted by *Report and Order* (MM Docket No. 88-315), 7 FCC Rcd _____ (released May 1, 1992). Although that action did not afford DuBois the protection it seeks for its preferred site, its request cannot be entertained in the context of this proceeding. First, DuBois failed to serve its comments on Beaver Dam Broadcasting, licensee of Station WVPV(FM), Beaver Dam, Kentucky, in violation of Section 1.401(d) of the Commission's Rules. Second, although Station WVPV(FM) has agreed to change its frequency and site location to accommodate Hancock's proposal at Cannelton, based upon Hancock's reimbursement commitment, there is no indication that DuBois, as a benefitting party, agreed to share in the reimbursement costs to Beaver Dam. *See York, AL*, 4 FCC Rcd 6923 (1989). Third, Station WVPV(FM) had not consented to the additional change in its facilities. Finally, DuBois did not demonstrate that there are no other sites available for use by Station WBDC(FM) other than the one discussed in its comments. Therefore, DuBois seeks protection of a site which cannot be considered as anything more than a preference, and also one where its approved use is speculative. *See Andalusia, AL*, 49 Fed. Reg. 32201, published August 13, 1984.

[9] Population figures are taken from the 1990 United States Census.

[10] We note that Channel 273A at Horse Cave at city reference coordinates 37-10-42 and 85-54-24 is 29.3 kilometers short-spaced to Channel 273C1 at Dickson, Tennessee, at coordinates 36-12-30 and 87-23-20. Although Montgomery requested a modification herein of the reference coordinates for Channel 273C1 at Dickson, its proposal has not been accepted in this proceeding. *See* footnote 16, *infra*. Therefore, no further consideration will be given to Channel 273A at Horse Cave, or to Heartland's request for severance.

8. In its comments, Hancock also offers an alternative arrangement of allotments that would permit both the Cannelton, Indiana, and Campbellsville, Kentucky, modification proposals to be accommodated, leaving only a comparative evaluation to be made between Brownstown and Edinburgh. Hancock proposes the substitution of Channel 271A at Lafayette, Tennessee, in lieu of Channel 272A proposed in the *Notice*, thereby eliminating the necessity to substitute Channel 294A for Channel 272A at Munfordville, Kentucky, to accommodate Heartland's proposal. Hancock asserts that maintaining the *status quo* at Munfordville would minimize disruption to existing service and would remove the conflict with the proposed substitution of Channel 294A for Channel 264A at Horse Cave, Kentucky, thereby eliminating the conflict between Option I and Option II announced in the *Notice*. Additionally, Hancock states that in the event Brownstown, rather than Edinburgh, is selected to receive Channel 275A, it would be compatible with Cannelton provided appropriate site restrictions are placed on each allotment.[11] In responsive comments, Heartland acceded to Hancock's alternative proposal, and renewed its request for severance from the remaining proposals contained in Option II of the *Notice*.

9. Myers objects to the requested substitution of Channel 294A for Channel 264A at Horse Cave, Kentucky, since it could not be used from its present owner-designated site. Myers claims that if proposed Station WLMK(FM) remains on Channel 264A at Horse Cave, it could result in the provision of service to 46,727 people, including 12,300 residents of the larger, nearby community of Glasgow, Kentucky.[12] Myers adds that a relocation of the tower for proposed Station WLMK(FM) to the site indicated in the *Notice* would place its tower 10.9 kilometers (6.8 miles) northeast of its present site, resulting in a weaker signal over Horse Cave and eliminating his opportunity to provide primary service to Glasgow. Thus, Myers endorses adoption of Option I of the *Notice*.

10. Wood Broadcasting, Inc. ("Wood"), licensee of Station WUCZ(FM), Channel 272A, Carthage, Tennessee, responded to the *Order to Show Cause*, advocating its support for the proposed substitution of Channel 281A for Channel 272A at Carthage, Tennessee, and modification of the license for Station WUCZ(FM), as contained in Option I of the *Notice*. Wood states that the substitution will enable Station WUCZ(FM) to operate at its present site as a six kilowatt Class A facility, and will serve to eliminate an intermodulation problem it is now experiencing on Channel 272A.

11. Montgomery counterproposed the substitution of Channel 273C1 for Channel 273C2 at Dickson, Tennessee,[13] and modification of its license for Station WQZQ-FM accordingly. Although Montgomery supports Heartland's proposal to substitute Channel 281A for Channel 272A at Carthage, it states that the proposed substitution of Channel 272A at Lafayette (contained in Option I) of the *Notice*, or Channel 273A at Horse Cave, as alternately proposed by Heartland, would affect its modification plans at Dickson.[14] Therefore, Montgomery also endorses the alternately proposed allotment of Channel 271A at Lafayette[15] in lieu of Channel 272A as suggested by Hancock to afford it greater flexibility in site selection.[16]

12. Hancock argues that Myers' objections to the proposed substitution of channels at Horse Cave, Kentucky, are unjustified. Hancock states that since Myers was granted a construction permit for proposed Station WLMK(FM) at Horse Cave during the pendency of this proceeding, he is afforded no protected rights to his proposed transmitter

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[11] In this regard, Hancock suggests a site restriction 11.9 kilometers (7.4 miles) northwest of Brownstown at coordinates 38-59-00 and 86-05-00, and 21.3 kilometers (13.2 miles) southeast of Cannelton at coordinates 37-46-00 and 86-35-30.

[12] Population figures provided by Myers were based on the 1980 U.S. Census.

[13] Montgomery is presently licensed to operate Station WQZQ-FM on Channel 272A at Dickson. However, Station WQZQ-FM was modified to specify operation on Channel 273C2 in MM Docket No. 86-399, 2 FCC Rcd 3837 (1987), for which a construction permit was issued (File No. BPH-871030IC) at coordinates 36-12-43 and 87-19-51. Montgomery advises that Station WQZQ-FM was again modified, at the request of American Communications, Inc. ("ACI"), the former licensee, to specify operation on Channel 273C1 at coordinates 36-12-30 and 87-23-20 in MM Docket No. 88-613, 4 FCC Rcd 8707 (1989). Montgomery asserts that ACI filed an application for a minor modification of its construction permit subsequent to the effective date of the Channel 273C1 upgrade for Station WQZQ-FM, to specify operation on Channel 273C2 (File No. BMPH-910513IG) at coordinates 36-12-35 and 87-20-16. Montgomery desires to pursue the previously approved modification of Station WQZQ-FM on Channel 273C1, at a preferred site, at coordinates 36-12-59 and 87-22-43, which is 4.4 kilometers (2.7 miles) short-spaced to the authorized site of Station WUCZ(FM), Carthage, at coordinates 36-18-43 and 85-57-08, and therefore dependent upon either the substitution proposed by Heartland at Carthage to accommodate its proposal, or the grant of an application to relocate the transmitter for Station WUCZ(FM) to specify operation at coordinates 36-13-36 and 85-53-39 (see File No. BPH-910819IG).

[14] Montgomery's preferred site for Channel 273C1 at coordinates 36-12-59 and 87-22-43 is 1.1 kilometers short spaced to proposed Channel 272A at Lafayette at coordinates 36-33-10 and 85-58-09.

With regard to Montgomery's objection to consideration of Channel 273A at Horse Cave, as stated in footnote 10, *supra*, we are affording no consideration to the use of Channel 273A at Horse Cave in the context of this proceeding.

[15] The distance between Montgomery's preferred site at coordinates 36-12-59 and 87-22-43 and alternately proposed Channel 271A at Lafayette at coordinates 36-30-45 and 85-58-45 is 129.8 kilometers (80.4 miles) whereas a distance of 75 kilometers (46.5 miles) is required.

[16] Although Montgomery's comments were accepted as a counterproposal in this proceeding, in retrospect, we believe its proposal should not have been accorded such status since no alternative or mutually-exclusive allotment is proposed which would require an amendment to the FM Table of Allotments. Rather, Montgomery's comments support the Campbellsville, Kentucky, proposal insofar as Heartland requests, *inter alia*, the substitution of Channel 281A for Channel 272A at Carthage, Tennessee, to accommodate Heartland's modification request. Montgomery's comments also support Hancock's alternate proposal to allot Channel 271A to Lafayette, Tennessee, in lieu of Channel 272A proposed in the *Notice*. The Carthage and Lafayette substitutions would enable Montgomery to file an application for its previously authorized modification to Channel 273C1, at a new reference site at Dickson, Tennessee, at coordinates 36-12-59 and 87-22-43. Montgomery may file its modification application to specify its revised site upon the conclusion of this proceeding.

site since he had actual knowledge that he might be required to change his channel of operation, depending on the outcome of this proceeding. Moreover, Hancock notes that Myers is not entitled to reimbursement costs associated with the requested change of frequency and transmitter relocation, since he received a construction permit during the course of this proceeding, citing *Pacific Grove and Soledad, CA*, 5 FCC Rcd 6700, 6701 n. 5 (1990), and *Bayou Vista and Franklin, LA*, 34 RR 2d 1540, 1541-42 (1975). Thus, Hancock urges there is no impediment to the requested substitution of Channel 294A for Channel 264A at Horse Cave to accommodate its proposal.

Discussion

13. None of the parties objected to the alternate allotment plans posed by Heartland (RM-7891) or Hancock (RM-7892). Although we have determined that Heartland's alternate proposal to substitute Channel 273A at Horse Cave, Kentucky, instead of Channel 294A proposed in the *Notice* is unacceptable, we have confirmed that Hancock's alternative proposal to substitute Channel 271A for Channel 281A at Lafayette, Tennessee, resolves the conflict between the Cannelton, Indiana, and Campbellsville, Kentucky, proposals, by removing the necessity to substitute channels at Munfordville, Kentucky. This approach, in turn, would remove the conflict between Munfordville (Option I), and Horse Cave (Option II), while permitting the requested upgrades at Campbellsville, Kentucky, with related substitutions at Carthage, Tennessee, and Lafayette, Tennessee, and an upgrade at Cannelton, Indiana, with accompanying substitutions at Beaver Dam and Horse Cave, Kentucky, thus eliminating the necessity of comparing the modification proposals.

14. However, two remaining requests which need to be comparatively considered are those of Potter and Rothrock to allot Channel 275A to either Brownstown or Edinburgh, Indiana, respectively, as a first local aural transmission service to either community. While we believe that both Brownstown (pop. 2,872)[17] and Edinburgh (pop. 4,536) are deserving of their first local aural transmission service, neither the proponents nor the Commission identified an alternate Class A channel for allotment to either community. Therefore, our decision will be premised on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), as follows:

(1) First full-time aural service;

(2) Second full-time aural service;

(3) First local service;

(4) Other public interest matters.

[Co-equal weight given to priorities (2) and (3).]

Neither Rothrock nor Potter has claimed that the allotment of Channel 275A at either community would provide any first or second full-time aural service,[18] but either could provide the communities with a first local transmission service. Since each proposal would advance priority (3), we must consider other public interest factors, such as the availability of reception services and population factors.

15. Edinburgh is located 48 kilometers (30 miles) south of Indianapolis, Indiana, 121 kilometers (75 miles) north of Louisville, Kentucky, and 124 kilometers (77 miles) west of Cincinnati, Ohio. Brownstown is located 69 kilometers (43 miles) north of Louisville, Kentucky, 98 kilometers (61 miles) south of Indianapolis, and 132 kilometers (82 miles) west of Cincinnati. A comparison of reception services reveals that neither community is underserved. Edinburgh receives 33 aural services and Brownstown receives 22.[19] As each community receives ample aural reception service, we believe the public interest would be served by allotting Channel 275A to Edinburgh since it could provide a first local aural transmission service to the more populous community. *See Three Oaks and Bridgman, MI*, 5 FCC Rcd 1004 (1990); and *Clarksville and Lanesville, IN*, 4 FCC Rcd 4968 (1989).

16. We also believe the public interest would be served by substituting Channel 281C3 for Channel 281A at Campbellsville, Kentucky, with concomitant changes at Carthage and Lafayette, Tennessee, and by substituting Channel 275C3 for Channel 275A at Cannelton, Indiana, with accompanying substitutions at Beaver Dam and Horse Cave, Kentucky. Myers objects to the substitution of Channel 294A for Channel 264A at Horse Cave, Kentucky, and the modification of his construction permit for proposed Station WLMK(FM), stating that the change would result in loss of coverage to Glasgow, Kentucky. Myers' argument regarding the speculative loss of potential reception service to Glasgow is not relevant to our determination herein.[20] Additionally, as noted by Hancock, Myers was served with a copy of the *Notice* in this proceeding, and his application for a construction permit was granted conditioned on

[17] Population figures were taken from the 1990 U.S. Census.

[18] We note that the entire service areas of proposed Channel 275A at Edinburgh and Brownstown are presently served by fulltime AM Stations WLW, Cincinnati, Ohio, and WHAS, Louisville, Kentucky.

[19] A staff analysis reveals that Edinburgh and Brownstown both receive daytime AM service from Stations WLW, Cincinnati, Ohio, WWKY and WHAS, Louisville, Kentucky, WXLW, WIBC and WTUX, Indianapolis, Indiana, WCSI, Columbus, Indiana, WGCL, Bloomington, Indiana, WZZB, Seymour, Indiana, and WKRP, North Vernon, Indiana. Brownstown receives additional daytime AM service from Stations WTMT, WFIA, WAVG and WDJX, Louisville, Kentucky, WSLM, Salem, Indiana, and WBIW, Bedford, Indiana. Edinburgh receives additional daytime AM service from Stations WSYW, WNDE, WFXF and WBRI, Indianapolis, Indiana, WYIC, Noblesville, Indiana, WTRE, Greensburg, Indiana, WOOO, Shelbyville, Indiana, WCKY, Cincinnati, Ohio, WMCB, Martinsville, Indiana, and WNTS, Beech Grove, Indiana. Brownstown and Edinburgh both receive FM service from Stations WQKC, Seymour, Indiana, WKKG, Columbus, Indiana, WFIU, Bloomington, Indiana, and WINN, North Vernon, Indiana. Brownstown also receives FM service from Stations WJAA, Austin, Indiana, and WSLM-FM, Salem, Indiana. Edinburgh also receives FM service from Stations WTTS, Bloomington, Indiana, WKLR, WFMS and WTLC, Indianapolis, Indiana, WPZZ, Franklin, Indiana, WENS, Shelbyville, Indiana, WZPL, Greenfield, Indiana, WWWY, Columbus, Indiana, and WRZQ-FM, Greensburg, Indiana.

[20] We note that Myers' primary obligation is to serve the needs and interests of the community to which he is licensed, and he has not shown that he could not do so from the alternate channel. *See* Section 73.1120 of the Commission's Rules.

the outcome of this proceeding. *See Hearing Designation Order ("HDO")*, MM Docket No. 91-40, 6 FCC Rcd 1364 (1991).[21] Under the circumstances, Myers is entitled neither to protection for his proposed transmitter site for Station WLMK(FM), nor to reimbursement since he became a permittee during the course of this proceeding. *See Pacific Grove and Soledad, CA, supra.*

17. As indicated in the *Notice*, the Cannelton modification also requires Beaver Dam Broadcasting, permittee of proposed Station WVPV(FM), Channel 274A, Beaver Dam, Kentucky, to change its frequency to Channel 264A, as well as to relocate its transmitter, which it has agreed to do, based upon Hancock's willingness to reimburse it for the reasonable costs associated with the changes.

18. Wood Broadcasting, Inc., licensee of Station WUCZ(FM), Channel 272A, Carthage, Tennessee, responded favorably to the *Order to Show Cause* why its license should not be modified to specify operation on Channel 281A to accommodate the Campbellsville, Kentucky, modification proposal. In accordance with established Commission policy, Wood is entitled to reimbursement from Heartland for the reasonable costs associated with changing frequencies. *See Circleville and Columbus, OH*, 8 FCC 2d 159 (1967). Heartland has previously stated its willingness to reimburse Wood Broadcasting, Inc., accordingly.

19. As indicated in the *Notice*, Channel 275A can be allotted to Edinburgh, Indiana, with a site restriction 15 kilometers (9.3 miles) southwest of the community,[22] to avoid a short-spacing to Station WRIP(FM), Channel 276A, Versailles, Indiana,[23] and to Station WFXF-FM, Channel 277B, Indianapolis, Indiana.[24] Channel 281C3 can be allotted to Campbellsville, Kentucky, at Heartland's specified site, located 15.5 kilometers (9.6 miles) north of the community.[25] Channel 281A can be allotted to Carthage, Tennessee, at the licensed site of Station WUCZ(FM).[26] Channel 271A can be allotted to Lafayette, Tennessee, with a site restriction 4.4 kilometers (2.7 miles) east of the community.[27] Channel 275C3 can be allotted to Cannelton, Indiana, at Hancock's specified site, located 14.8 kilometers (9.2 miles) southeast of the community.[28] Channel 264A can be allotted to Beaver Dam, Kentucky, at the suggested site specified for proposed Station WVPV(FM).[29] Channel 294A can be substituted for Channel 264A at Horse Cave, Kentucky, at a restricted site 6.4 kilometers (4.0 miles) northeast of the community[30] to avoid a short-spacing to Channel 296C2 at Smiths Grove, Kentucky, as well as to the site specified for Station WBLG(FM) at that community.[31]

20. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WCKQ(FM) to specify operation on Channel 281C3 in lieu of Channel 281A at Campbellsville, Kentucky; and the permit of Station WKCM-FM to specify operation on Channel 275C3 in lieu of Channel 275A at Cannelton, Indiana. Additionally, we are modifying the license of Station WUCZ(FM) to specify operation on Channel 281A in lieu of Channel 272A at Carthage, Tennessee, and substituting Channel 271A for Channel 281A at Lafayette, Tennessee, to accommodate the Campbellsville modification.[32] Since Beaver Dam Broadcasting has consented to change its frequency of operation and to relocate the transmitter for Station WVPV(FM), we are also modifying its permit to specify operation on Channel 264A in lieu of Channel 274A at Beaver Dam, Kentucky. We are also modifying the permit for Station WMLK(FM) to specify operation on Channel 294A in lieu of Channel 264A at Horse Cave, Kentucky, to accommodate the Cannelton modification. Heartland is required to reimburse Wood Broadcasting for the reasonable costs associated with the modification of facilities for Station WUCZ(FM), Carthage, Tennessee, and Hancock is required to reimburse Beaver Dam Broadcasting for its reasonable costs associated with the changes at Beaver Dam, Kentucky *See Circleville, OH, supra.* As indicated previously, James B. Myers, III, permittee of proposed Station WMLK(FM), Channel 264A, Horse Cave, Kentucky, is not entitled to reimbursement costs from Hancock for any expenses associated with relocating his transmitter and changing frequencies to specify operation on Channel 294A since the grant of his construction permit was conditioned upon the outcome of this proceeding. *See Soledad, CA, supra.* The Lafayette, Tennessee, applicants may amend their applications to specify Channel 271A in

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[21] The *HDO* conditioned the issuance of a construction permit at Horse Cave on the outcome of Hancock's petition in "RM-6558." *See* 6 FCC Rcd 1364 (1991). However RM-6558 was a counterproposal request filed by Lee Stinson to allot Channel 260A to Horse Cave in the context of MM Docket No. 88-215, and was not associated with Hancock's proposal at Cannelton (RM-7580) in the instant proceeding. *See* 4 FCC Rcd 5770 (1989).

[22] Coordinates used for Channel 275A at Edinburgh are 39-16-40 and 86-06-25.

[23] Coordinates at the licensed site of Station WRIP(FM), Channel 276A, Versailles, Indiana, are 39-10-38 and 85-17-00.

[24] Coordinates at the licensed site of Station WFXF-FM, Channel 277B, Indianapolis, Indiana, are 39-53-43 and 86-12-04.

[25] Coordinates used for Channel 281C3 at Campbellsville, Kentucky, are 37-28-22 and 85-16-27.

[26] Coordinates used for Channel 281A at Carthage are 36-18-43 and 85-57-08.

[27] Coordinates used for Channel 271A at Lafayette are 36-30-45 and 85-58-45.

[28] Coordinates used for Channel 275C3 at Cannelton are 37-51-00 and 86-36-00.

[29] Coordinates used for Channel 264A at Beaver Dam, Kentucky, are 37-21-20 and 86-44-00.

[30] Coordinates used for Channel 294A at Horse Cave, Kentucky, are 37-13-26 and 85-51-46.

[31] Coordinates used for Channel 296C2 at Smiths Grove, Kentucky, are 36-50-10 and 86-16-40. Coordinates at the site specified in the construction permit for Station WBLG(FM) are 36-50-35 and 86-15-30. Although the substitution of proposed Channel 294A at Horse Cave reflects a short-spacing to the present operation of Station WHHT(FM), Channel 294A, Cave City, Kentucky, at coordinates 37-06-39 and 85-58-41, Station WHHT(FM) was modified to specify Channel 279A (*see* 4 FCC Rcd 8749 (1989)), and subsequently modified to Channel 279C3 (*see* 6 FCC Rcd 387 (1991)), for which an application for a construction permit has been issued (File No. BPH-910920IB). We will serve Newberry Broadcasting, Inc., licensee of Station WHHT(FM), with a copy of this *Report and Order*.

[32] Although the proposal to modify the license for Station WLOC-FM to specify operation on Channel 294A in lieu of Channel 272A at Munfordville, Kentucky (Option I), is no longer required to accommodate the Campbellsville, Kentucky, modification request, we will serve South Central Kentucky Broadcasting, licensee of Station WLOC-FM, with a copy of this *Order*.

lieu of Channel 281A without loss of "cut-off" status since no upgrade in the class of channel will result. *See Marina, CA*, 6 FCC Rcd 1491 (1991).

21. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Cannelton, Indiana	275C3
Edinburgh, Indiana	275A
Beaver Dam, Kentucky	264A
Campbellsville, Kentucky	260A, 281C3
Horse Cave, Kentucky	294A
Carthage, Tennessee	281A
Lafayette, Tennessee	271A

22. The window period for filing applications for Channel 275A at Edinburgh, Indiana, will open on **July 7, 1992,** and close on **August 6, 1992.**

23. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communiations Act of 1934, as amended, the license of Heartland Communications, Inc., for Station WCKQ(FM), Campbellsville, Kentucky, and the construction permit issued to Hancock Communications, Inc. for Station WKCM-FM, Cannelton, Indiana, ARE MODIFIED to specify operation on Channels 281C3 and 275C3, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee and permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

24. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wood Broadcasting, Inc., for Station WUCZ(FM), Carthage, Tennessee, and the construction permits of Beaver Dam Broadcasting for Station WVPV(FM), Beaver Dam, Kentucky, and James B. Myers, III for Station WMLK(FM), Horse Cave, Kentucky, ARE MODIFIED to specify operation on Channels 281A, 264A, and 294A, respectively, in lieu of their present operation on Channels 272A, 274A and 264A, respectively, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorizations for Stations WUCZ(FM), WVPV(FM) and WMLK(FM), except the channels as specified above. Any other changes, except those so specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for a construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the stations' authorizations except for the channels as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

25. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Hancock Communications, Inc., permittee of Station WKCM-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.[33]

26. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensees of Station WUCZ(FM), Station WLOC-FM and Station WQZQ-FM; the permittees of Station WVPV(FM), Station WMLK(FM), and Station WHHT(FM); and the applicants for Channel 281A at Lafayette, Tennessee, as follows:

Wood Broadcasting, Inc.
Radio Station WUCZ(FM)
P.O. Box 79
Carthage, TN 37030

South Central Kentucky Broadcasting
Radio Station WLOC-FM
Munfordville, KY 42765

[33] Heartland's modification request to operate Station WCKQ(FM) on Channel 281C3 at Campbellsville, Kentucky, was originally accepted as a counterproposal in MM Docket No. 89-570. See *Public Notice*, February 27, 1990, Report No. 1808. Heartland's proposal was not adopted in the context of that proceeding since it offered a resolution in reply comments which conflicted with the Cannelton proposal herein. Rather, the Commission decided to treat Heartland's resolution in conjunction with Hancock's proposal in the instant proceeding. *See* 6 FCC Rcd 3289 (1991). Therefore, since Heartland's original request was filed prior to May 21, 1990, the effective date of the fee collection program implementing the provisions of the *Omnibus Budget Reconciliation Act of 1989*, (Gen. Docket No. 86-285), 5 FCC Rcd 3558, 3575 (1989), it is not required to submit a rule making fee when filing its application to implement the upgrade.

Beaver Dam Broadcasting Company
Radio Station WVPV(FM)
P.O. Box 130
Morgantown, KY 42261

James B. Myers, III
Radio Station WLMK(FM)
405 East Les Turner Road
Cave City, KY 42127

Montgomery Broadcasting Company
Radio Station WQZQ-FM
P.O. Box 150846
Nashville, TN 37215

Newberry Broadcasting, Inc.
Radio Station WHHT(FM)
P.O. Box 457
Glasgow, KY 42141

Ivon O. Davis
717 Days Road
Lafayette, TN 37086

Lafayette Broadcasting Company, Inc.
P.O. Box 160
Lafayette, TN 37083.

27. IT IS FURTHER ORDERED, That the petition of William C. Potter (RM-7426) to allot Channel 275A to Brownstown, Indiana, IS DENIED.

28. IT IS FURTHER ORDERED, That the counterproposals of Heartland Communications, Inc. (RM-7891) and Montgomery Broadcasting Company (RM-7893) ARE DISMISSED.

29. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

30. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 275A at Edinburgh, Indiana, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-22

In the Matter of

Amendment of Section 73.202(b), RM-7898
Table of Allotments,
FM Broadcast Stations.
(Dumas and Marianna, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 7 FCC Rcd 1366 (1992), issued in response to a petition filed on behalf of Alan W. Eastham and Craig Eastham, d/b/a KXFE-FM ("petitioners"), licensee of Station KXFE(FM), Channel 296A, Dumas, Arkansas, proposing the substitution of Channel 295C3 for Channel 296A and modification of the license to specify operation on the higher-powered channel. The *Notice* also proposed the substitution of Channel 287A for vacant Channel 295A at Marianna, Arkansas,[1] to accommodate the requested substitution at Dumas. Petitioners filed supporting comments reaffirming their intention to apply for Channel 295C3, if allotted to Dumas. No other comments were received.

2. We believe the public interest would be served by granting the modification request at Dumas since it will enable Station KXFE(FM) to provide an expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 295C3 for Channel 296A at Dumas, and modify the license for Station KXFE(FM) accordingly. In order to accommodate the Dumas modification, we will substitute Channel 287A for Channel 295A at Marianna, Arkansas, as requested. Channel 295C3 can be allotted to Dumas at the petitioner's specified site located 13.9 kilometers (8.6 miles) west of the community,[2] consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules.[3] Channel 287A can be allotted to Marianna with a site restriction 1.2 kilometers (0.7 miles) north of the community[4] to avoid a short spacing to Station KCLT(FM), Channel 285A, West Helena, Arkansas.[5]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Dumas, Arkansas	295C3
Marianna, Arkansas	287A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Alan W. Eastham and Craig Eastham, d/b/a KXFE-FM, for Station KXFE(FM), IS MODIFIED to specify operation on Channel 295C3 in lieu of Channel 296A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Alan W. Eastham and Craig Eastham, d/b/a KXFE-FM, licensee of Station KXFE(FM), are required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

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[1] The *Notice* announced that the construction permit issued to Ramblin Communications for Channel 295A at Marianna, Arkansas (File No. BPH-910617JZ), was cancelled by letter on October 15, 1991, and therefore a new filing window would be opened for the channel at the conclusion of this proceeding.

[2] Coordinates used for Channel 295C3 at Dumas are 33-55-34 and 91-38-04.

[3] As stated in the *Notice,* the site restriction at Dumas is required to negate a short spacing to Channel 294C2 at Benton, Arkansas, at reference coordinates 34-42-05 and 92-30-00. We recognize that the allotment of Channel 295C3 at Dumas conflicts with the construction permit issued for Station WMJW(FM), Channel 295A, Cleveland, Mississippi. However, Station WJMW(FM) has been modified to specify operation on Channel 298C3 and to change its community of license to Rosedale, Mississippi. *See* 6 FCC Rcd 5583 (1991). Station WMJW(FM) has filed a modification application (File No. BMPH-920326IG) at Rosedale specifying coordinates 33-56-48 and 90-50-58. A copy of this *Order* will be served on the permittee of Station WMJW(FM).

[4] Coordinates used for Channel 287A at Marianna are 34-47-01 and 90-45-59.

[5] Coordinates at the licensed site of Station KCLT(FM) are 34-30-56 and 90-40-13.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of Station WMJW(FM), as follows: Carol B. Ingram, P.O. Box 73, Batesville, MS 38606.

7. IT IS FURTHER ORDERED, That the window period for filing applications for Channel 287A at Marianna, Arkansas, will open on **July 7, 1992,** and close on **August 6, 1992.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process for Channel 287A at Marianna, Arkansas, should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-343

In the Matter of

Amendment of Section 73.202(b), RM-7858
Table of Allotments,
FM Broadcast Stations.
(Sulphur, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Central Oklahoma Radio Corporation ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 7013 (1991), proposing the substitution of Channel 265C2 for Channel 265C3 at Sulphur, Oklahoma, and the modification of Station KFXT(FM)'s license to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 265C2 for Channel 265C3 at Sulphur since it could provide the community with a wide coverage area service and enable the expansion of Station KFXT(FM)'s service area. Channel 265C2 can be allotted to Sulphur in compliance with the Commission's minimum distance separation requirements at the station's presently licensed transmitter site.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Sulphur, Oklahoma	265C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Central Oklahoma Radio Corporation for Station KFXT(FM), Sulphur, Oklahoma, IS MODIFIED to specify operation on Channel 265C2, in lieu of Channel 265C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Central Oklahoma Radio Corporation, licensee of Station KFXT(FM), is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 265C2 at Sulphur are North Latitude 34-32-57 and West Longitude 96-58-34.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-344

In the Matter of

Amendment of Section 73.202(b), RM-7856
Table of Allotments,
FM Broadcast Stations.
(Maroa, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission is the *Notice of Proposed Rule Making*, 6 FCC Rcd 7112 (1991), issued in response to a petition for rule making filed by TNT Communications ("petitioner"), proposing the allotment of Channel 297A to Maroa, Illinois, as the community's first local FM service. Petitioner filed comments restating its interest in Channel 297A, if allotted. Farm to Market Radio ("FMR") filed a counterproposal.[1] TNT filed reply comments.

2. We believe the public interest would be served by the allotment of Channel 297A to Maroa, Illinois, as that community's first local FM service. Channel 297A can be allotted to Maroa in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.6 kilometers (7.8 miles) southwest, in order to avoid a short-spacing to Station WPGU(FM), Channel 296A, Urbana, Illinois.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Maroa, Illinois	297A

4. The window period for filing applications will open on **July 7, 1992,** and close on **August 6, 1992.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] FMR's counterproposal seeks the substitution of Channel 298A for Channel 261A at Lincoln, Illinois, in lieu of Channel 230A as proposed in MM Docket No. 90-523, 5 FCC Rcd 6577 (1990), in order to accommodate the allotment of Channel 230B1 to Maroa. FMR notes that it requested this allotment in a counterproposal to MM Docket No. 90-523, but that counterproposal was not placed on public notice.

In a *Report and Order* in MM Docket No. 90-523 adopted simultaneously with this action, we conclude that FMR's counterproposal was unacceptable when filed because it was mutually exclusive with a counterproposal filed in MM Docket No. 90-477. Our engineering analysis indicates that FMR's counterproposal herein continues to be mutually exclusive with that counterproposal which seeks, *inter alia*, the substitution of Channel 229A for Channel 267A at Mattoon, Illinois (RM-7630). Therefore, the counterproposal remains unacceptable.

We also note that FMR failed to include any technical studies in support of the proposal, but instead referred to the technical studies submitted with its filings in MM Docket No. 90-477.

[2] The coordinates for Channel 297A at Maroa are North Latitude 39-57-12 and West Longitude 89-03-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-523

In the Matter of

Amendment of Section 73.202(b), RM-7495
Table of Allotments,
FM Broadcast Stations.
(Lincoln, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6577 (1990), issued in response to a petition filed by L & M Broadcasting Co. Inc. ("L & M"), licensee of Station WESZ(FM), Channel 261A, Lincoln, Illinois,[1] requesting the substitution of Channel 230A for Channel 261A at Lincoln and modification of its license for Station WESZ(FM) to specify operation on Channel 230A. L & M filed supporting comments restating its intention to apply for Channel 230A, if allotted to Lincoln. Farm to Market Radio ("FMR") filed an unacceptable counterproposal.[2] USA Radio Corporation ("USA"), licensee of Station WTJY(FM), Channel 224A, Taylorville, Illinois, filed a counterproposal.[3] L & M filed a "notice of appearance" stating its intention to file reply comments. After the record closed L & M filed a motion to expedite the proceeding.[4]

2. We believe the public interest would be served by substituting Channel 230A for Channel 261A at Lincoln, Illinois, since it could permit Station WESZ to expand its service area. L & M states that it will change its transmitter site to operate at 6 kW on Channel 230A. Channel 230A can be allotted to Lincoln in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.9 kilometers (8 miles) southeast in order to avoid a short-spacing to Station WKZW(FM), Channel 227B, Peoria, Illinois.[5]

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Lincoln, Illinois	230A

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of L & M Broadcasting Co., Inc. for Station WESZ(FM), IS MODIFIED, to specify operation on Channel 230A in lieu of Channel 261A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in license (BLH-5122) except the channel as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with license (BLH-5122) except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

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[1] L & M's assignment of license from Capital Broadcasting, Inc., was granted on August 24, 1990.

[2] FMR's counterproposal, although timely filed in this proceeding, is unacceptable for consideration. FMR proposes the allotment of Channel 230B1 to Maroa, Illinois, as that community's first local transmission service. However, this proposal is mutually exclusive with a counterproposal filed in MM Docket No. 90-477, 5 FCC Rcd 6341 (1990), seeking, *inter alia*, the substitution of Channel 229A for Channel 267A at Mattoon, Illinois (RM-7630). The deadline for counterproposals in MM Docket No. 90-477 was December 21, 1990, and FMR's counterproposal was filed on December 26, 1990. Because FMR's counterproposal was filed after the cut-off date in MM Docket No. 90-477, and is mutually exclusive with a counterproposal filed therein, it is unacceptable for consideration. Accordingly, we need not consider FMR's subsequent filings in this proceeding, or comments responsive thereto.

[3] USA's counterproposal suggested two alternative options in order to accommodate an upgrade of Station WTJY(FM), Channel 224A, Taylorville, Illinois, in MM Docket No. 90-510. We note that Station WTJY(FM) has been upgraded from Channel 224A to Channel 224B1 in MM Docket No. 90-510. *See* 7 FCC Rcd 2099 (1992). Therefore, all comments regarding USA's counterproposal are moot and need not be discussed.

[4] This motion is moot with our actions herein.

[5] The coordinates for Channel 230A at Lincoln are North Latitude 40-02-00 and West Longitude 89-20-00.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-358

In re Applications of

TEXAS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870710MJ
BEAUMONT SKYWAVE, INC.	File No. BPH-870710NA
CHM BROADCASTING	File No. BPH-870710NC

For a Construction Permit for a
New FM Station, Channel 273C2,
Beaumont, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 26, 1992

By the Commission:

1. Before the Commission for consideration is a Commission memorandum opinion and order upholding a Review Board decision granting the application of Beaumont Skywave, Inc. (BSI) for a new FM radio station in Beaumont, Texas, and denying the competing applications of Texas Communications Limited Partnership (Texas Ltd.) and CHM Broadcasting (CHM). *Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991).[1] The Commission agreed with the Board that Texas Ltd. was disqualified because its transmitter constituted a hazard to air navigation and that CHM was not financially qualified. Therefore, the Commission affirmed the Board's decision granting the application of BSI, the only qualified applicant remaining. CHM now seeks reconsideration of the Commission's decision, and Texas Ltd. requests both reconsideration and that the record be reopened to examine the ownership structure and financial qualifications of BSI.

I. CHM'S FINANCIAL QUALIFICATIONS

2. CHM asserted that its financial certification was based on two alternative proposals for meeting the estimated cost of $482,000 for construction and operation of the proposed station. First, CHM claimed that it relied on a bank letter from East Texas Savings Bank (ETSB) for $350,000 and a written pledge of $150,000 from its limited partner, Kent Foster. Second, CHM claimed that it also relied on Foster's oral promise to provide $500,000 without the aid of bank financing. 6 FCC Rcd at 5191 ¶ 12.

3. The Commission found that, even assuming that CHM had necessary financing at the time it certified its qualifications, it did not demonstrate that it was currently qualified. The Commission held that CHM could not rely on the ETSB letter or on any of the bank letters that CHM subsequently tendered as a substitute for the ETSB letter. ETSB became insolvent in November 1988, and although CHM secured a replacement letter from National Bank of Washington (NBW) in March of 1989, CHM did not file an amendment substituting the NBW letter. CHM did not even report these circumstances to the Commission until July of 1989, in response to a supplement to BSI's petition to add financial issues against CHM, which contained allegations concerning the failure of ETSB. 6 FCC Rcd at 5191 ¶ 3, 5192 ¶ 8. Indeed, in its first response to BSI's May 30, 1989 petition to enlarge issues, CHM left the impression that the ETSB letter was still viable. Based on these facts, the Commission determined that CHM had failed to take the necessary procedural steps to file an amendment substituting the NBW letter or to demonstrate the requisite good cause to make the NBW letter part of its proposal even if it had submitted a proper amendment. Specifically, the Commission found that CHM did not show that it proceeded with due diligence in bringing the pertinent facts to the Commission's attention and also that it would be necessary to consider whether to add a lack of candor issue given CHM's earlier failure to report both ETSB's insolvency and its reliance on a new bank letter. Under these circumstances, the Commission held that the NBW letter was never a part of CHM's financial proposal and that CHM had no basis for relying on it.[2] *See* 6 FCC Rcd at 5192 ¶¶ 7-10.

4. Accordingly, the Commission held that CHM's financial qualifications depended on Foster's ability to provide the $482,000 needed for construction and operation of the proposed facility for three months without revenue. In this regard, the Commission concluded that Foster had failed to demonstrate that he had the ability to provide the requisite funds for construction and operation of the proposed Beaumont facility in light of his total commitment of $3.6 million to fund various FCC applications, including CHM's. *See* 6 FCC Rcd at 5192-93 ¶¶ 11-14.

5. CHM contends that it was entitled to rely on the NBW letter without having to amend its application. Specifically, CHM argues that the Commission's financial certification procedure, in effect at the time CHM's application was filed, did not require it to document its financial qualifications, and since no documentation was required, there was no corresponding requirement to report minor changes in its financial proposal. CHM also argues that it is not bound by *Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991), cited in the Commission's order for the proposition that a new financial proposal cannot be accepted absent a petition to amend filed pursuant to 47 C.F.R. § 73.3522(b), since that case was decided long after CHM's financial proposal changed.

6. Alternatively, CHM argues that, because it had good cause to amend its application, its failure to observe the procedural formalities of submitting the NBW letter as an amendment with the requisite showing for 47 C.F.R. § 73.3522(b) is of no consequence. CHM asserts that it was financially qualified when it so certified and that it acted with due diligence to replace the ETSB letter, after it lost that letter through no fault of its own. CHM further asserts that acceptance of the NBW letter would not have re-

quired the addition of new issues since CHM did not lack candor in failing to report the changed circumstances earlier and since the NBW letter itself raised no new issues.

7. In light of CHM's arguments on reconsideration, we believe it is desirable to amplify the basis for our finding that CHM is not entitled to rely on a bank letter to establish its financial qualifications. Specifically, we wish to deal explicitly with CHM's claim that it did not need to report the failure of ETSB because it relied alternatively on Foster alone to finance its proposal. In certifying its financial qualifications, CHM was required to have the ability to construct and operate the proposed facility for three months. *See Northampton Media Associates*, 4 FCC Rcd 5517, 5518 ¶ 12 (1989). Although CHM assertedly based its certification on two alternative proposals, one being Foster's oral representation that he would provide all the necessary financing, Ms. Hatcher, the general partner who made the financial certification did not take steps to support certifying CHM's financing with respect to Foster's claimed oral promise of funds. Ms. Hatcher never reviewed a financial statement in order to determine Foster's ability to provide financing, and she had no personal knowledge of Foster's assets and liabilities. Tr. 1084-1091, 1114-15. When an individual, and not a financial institution, is a source of funds, the applicant must demonstrate that it ascertained, at the time of certification, that the individual has sufficient resources to meet his financial commitment. *See Aspen*, 6 FCC Rcd at 1603 ¶ 8. This CHM did not do with respect to Foster's pledge. Consequently, although CHM seeks to rely on alternative sources of funding, in light of the defect in CHM's certification with respect to Foster's pledge of funds, the bank letter was an essential element of CHM's proposal.[3]

8. Given the crucial significance of the ETSB letter, CHM had to make a good cause showing for an amendment of its application, pursuant to 47 C.F.R. § 73.3522(b) after CHM lost its assurance that the ETSB letter was viable.[4] Although CHM did not have to present the details of its financial proposal in the application itself, CHM had to have, at the time of certification -- and thereafter -- a specific financial proposal that would provide reasonable assurance of sufficient net liquid assets or funds from committed sources for construction and operation for the relevant time period. *Northampton*, 4 FCC Rcd at 5519 ¶¶ 15-16. CHM did not have a viable proposal after the failure of ETSB and therefore could no longer certify that it was qualified. CHM should have promptly reported this change pursuant to 47 C.F.R. § 1.65 to the Commission. Moreover, when CHM was asked about its financial qualifications as a result of BSI's petition to enlarge the issues, CHM had to demonstrate the adequacy of both its proposal at the time it certified and -- because it no longer relied on its original proposal -- its subsequent proposals. Finally, in order to rely on its subsequent proposals, CHM had to demonstrate, as noted above, that it had good cause for an amendment substituting these new proposals for its original proposal.[5] *See, e.g., McClenanhan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7270-71 ¶ 8 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2347 (1991), *recon. denied*, 6 FCC Rcd 5183 (1991).

9. Under the circumstances presented here, CHM has not shown good cause for its substitution of the NBW letter for the original ETSB letter; therefore, CHM is not entitled to rely on the NBW letter. CHM did not notify the Commission that ETSB had failed, nor did it report that it secured a replacement letter. In this regard, we find it significant that CHM failed to inform the Commission, even in its response to BSI's petition to enlarge issues, of the pertinent circumstances regarding its financial proposals. Thus, CHM did not show that it acted with due diligence in substituting the NBW letter for the ETSB letter and there is a question of lack of candor, the resolution of which would disrupt the proceeding.[6] Specifically, we note that BSI filed a petition to enlarge issues against CHM on May 30, 1989, seeking the addition of a financial qualifications issue and misrepresentation issues concerning CHM's financial certification. In response, CHM asserted in its opposition, filed June 9, 1989, that BSI failed to establish that CHM was not financially qualified at the time it filed its application and that BSI offered no evidence that it did not remain financially qualified. CHM attached to its opposition a copy of the ETSB letter and stated that "CHM possesses and has possessed for nearly two years the necessary documentation that it *has* available the [necessary] financial resources." CHM Opposition to BSI Petition to Enlarge at 3 (emphasis in original). From CHM's response, it appeared that as of June 9, 1989, there was no question as to the viability of the ETSB letter and that CHM was still relying on that commitment to demonstrate its financial qualifications.

10. In fact, CHM knew that ETSB had been declared insolvent in November 1988, and, as a consequence, had in March 1989 obtained the NBW letter. BSI's petition put CHM on clear notice that a full, candid description of its current financial proposal and the steps taken to effectuate it was called for -- a circumstance that considerably aggravates CHM's earlier failure to report the demise of ETSB. However, it was not until BSI supplemented its petition to enlarge issues, and itself reported the failure of ETSB and the successor bank's unwillingness to honor the ETSB letter to CHM, that CHM came forward with the NBW letter it had obtained the previous March. CHM Opposition to Supplement to Petition to Enlarge Issues filed July 18, 1989. CHM's failure to make any showing of its efforts after loss of the ETSB letter reflects at best a lack of diligence.

11. Moreover, CHM's failure to make a full disclosure in response to BSI's petition to enlarge raises the question of whether CHM lacked candor in this regard. *See RKO General, Inc. v. FCC*, 670 F.2d 215, 229-31 (D.C. Cir. 1980). Thus, considering the NBW letter as part of CHM's financial proposal would have required the resolution of candor and reporting issues.[7] *See, e.g., Las Americas Communications, Inc.*, 6 FCC Rcd 1507, 1509-10 ¶¶ 18-22 (1991)(financial and candor issues added when applicant, in response to petition to enlarge issues, concealed relevant information and failed to report to the Commission changes in its financial proposal); *Marlin Broadcasting of Central Florida, Inc.*, 5 FCC Rcd 5751, 5752 ¶¶ 8-11 (1990), *recon. denied*, 5 FCC Rcd 7446 (1990), *aff'd* Nos. 90-1505 (D.C. Cir. Jan. 7, 1992)(application denied on comparative grounds; however, if applicant had been comparatively superior, its application could not have been granted without determining whether reporting, misrepresentation and financial issues were warranted based on applicant's failure to report that the investment firm on which it relied for financing had ceased operation, as well as the applicant's continued representations concerning the investment firm's commitment after the firm had ceased operation).[8] In view of the foregoing, we adhere to our conclusion that CHM has shown no basis for reliance on the NBW letter or subsequent bank letters.

II. TEXAS LTD.'S PETITIONS FOR RECONSIDERATION AND TO REOPEN THE RECORD

12. Texas Ltd. requests that the record be reopened and that issues be added to determine whether BSI is a *bona fide* two-tiered stock corporation, whether BSI has misrepresented facts concerning its structure and control, whether BSI is financially qualified, and whether BSI misrepresented facts or lacked candor in certifying its financial qualifications. Texas Ltd.'s request, filed both as a petition to reopen the record pursuant to 47 C.F.R. § 1.229 and as a petition for reconsideration pursuant to 47 C.F.R. § 1.106(b), is based on the Review Board's decision in *Evansville Skywave, Inc.*, 6 FCC Rcd 5373 (Rev. Bd. 1991). In that decision, the Board found that Evansville Skywave, Inc. (ESI) was not qualified to be a Commission licensee since its ownership structure, a two-tiered stock corporation, was not *bona fide*. *See* 6 FCC Rcd 5375 ¶¶ 12-13. Specifically, the Board found that ESI's purported passive investor, Skywave Communications Corporation (SCC), actually controlled the applicant. SCC is also the non-voting shareholder of BSI. Texas Ltd. sets out at length circumstances relating to the organization of BSI, which Texas Ltd. claims parallel those that the Board found objectionable in *Evansville*. Consequently, Texas Ltd. asserts that the record must be reopened in this proceeding to determine whether BSI is also unqualified in light of the involvement of SCC, the character qualifications of which have already been discredited in *Evansville*, as well as to determine whether BSI is financially qualified.

13. Texas Ltd.'s requests are untimely. The facts alleged by Texas Ltd. in support of the addition of issues concerning the *bona fides* of BSI's ownership structure and finances have been available to Texas Ltd. for at least 2 years. However, it was not until the Board's ruling concerning ESI that Texas Ltd. requested that the record be reopened. The Board's decision with regard to the legal significance of similar facts concerning the ownership structure of ESI under issues specified in the *Evansville* proceeding on April 12, 1989 does not constitute new facts justifying reopening the record and adding the requested issues now. *See Tri-State Community Development and Communications Corporation*, FCC 89M-1137 (Apr. 12, 1989). In view of the untimeliness of Texas Ltd.'s request, we must determine whether Texas Ltd.'s petition complies with the standards set forth in 47 C.F.R. § 1.229 (c), which provides for consideration of a late-filed petition to modify issues only if it raises a question of probable decisional significance and such substantial public interest importance as to warrant consideration in spite of its untimely filing. *See Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 ¶ 8 (1991). Texas Ltd.'s allegations implicate BSI's basic qualifications, and thus raise issues of substantial public importance. However, Texas Ltd. has failed to meet its burden of showing that the facts alleged concerning BSI's ownership structure and finances constitute matters of probable decisional significance since Texas Ltd. has not established a likelihood that the potentially disqualifying allegations will be proven.[9] *Id.* at 4332 ¶ 9.

14. The facts alleged by Texas Ltd. concerning the ownership structure of BSI and the relationship between BSI's sole voting shareholder, Alice Felix Ramsey, and SCC and its president, Leon Perkinson, were considered by the ALJ under the integration analysis. *See Texas Communications Limited Partnership*, 5 FCC Rcd 1592, 1596-97 ¶ 28-37. No issue was requested or specified concerning the *bona fides* of BSI's ownership structure; however, the ALJ found that SCC would not be a passive investor and therefore granted BSI only partial credit for its integration proposal. *Id.* at 1600 ¶¶ 62-65. BSI's failure to demonstrate the reliability of its described ownership structure does not, however, without more, establish that BSI committed disqualifying misconduct. *See Royce International Broadcasting*, 5 FCC Rcd 7063. 7065 n.6 (1990), *recon. denied*, 6 FCC Rcd 2601 (1991). Here, Texas Ltd. does not allege that BSI made any false statements concerning its ownership structure or that it otherwise engaged in disqualifying conduct. Consequently, Texas Ltd. has failed to show that the facts alleged warrant reopening the record.[10]

15. Furthermore, we decline to add the requested financial and financial certification issues. Texas Ltd.'s allegations in this respect also parallel issues raised in *Evansville*.[11] Texas Ltd. contends that a bank letter issued by Banc One, on which BSI relies to establish its financial qualifications is a mere "accommodation letter" -- *i.e.*, that Banc One issued the letter to BSI without having reviewed BSI's financial statement, credit history or business plan for the proposed station. Texas Ltd. alleges that Alice Felix Ramsey never met with Banc One and provided the bank with no information on which to base a letter that would give BSI reasonable assurance of financing for construction and operation of the proposed station. Texas Ltd. also argues that in light of findings concerning Banc One's relationship with SCC in the *Evansville* proceeding, further inquiry is necessary to determine whether BSI falsely certified its financial qualifications and whether BSI is financially qualified.[12]

16. The record reflects that, while Ramsey requested assistance from Leon Perkinson, SCC's president, in obtaining the bank letter, Ramsey had telephone conversations with Banc One's representative concerning the loan, modified the draft bank letter provided by SCC, and provided Banc One with her own cost estimates. Tr. 311-314, 458. Under these circumstances, Texas Ltd.'s allegations amount to nothing more than speculation and the issues specified in other proceedings do not, absent specific allegations of fact pertinent to BSI's financial arrangements, constitute matters of such probable decisional significance as to warrant new issues against BSI at this late stage of the proceeding. *See Great Lakes*, 6 FCC Rcd at 4332 ¶ 9.

III. ORDERS

17. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed October 7, 1991 by CHM Broadcasting IS DENIED and the Petition to Reopen the Record and Enlarge Issues Against Beaumont Skywave, Inc. filed October 3, 1991 by Texas Communications Limited Partnership, and the Petition for Reconsideration filed October 7, 1991 by Texas Communications Limited Partnership ARE DISMISSED.

18. IT IS FURTHER ORDERED, That the Petition for Leave to Amend filed October 9, 1991 by CHM Broadcasting IS DISMISSED as moot in light of the disposition of matters herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are before the Commission: (1) Petition to Reopen the Record and Enlarge Issues against BSI filed October 3, 1991 by Texas Ltd.; (2) Petition for Reconsideration filed October 7, 1991 by Texas Ltd.; (3) Consolidated Opposition to Texas Ltd.'s Petition to Enlarge Issues and Petition for Reconsideration filed October 17, 1991 by BSI; (4) Reply to Consolidated Opposition filed October 31, 1991 by Texas Ltd.; (5) Petition for Reconsideration filed October 7, 1991 by CHM; (6) Motion for Leave to Substitute Corrected Copies and Corrected Petition for Reconsideration filed October 9, 1991 by CHM; (7) Opposition to Petition for Reconsideration of CHM filed October 21, 1991 by BSI; (8) Reply to Opposition filed October 31, 1991 by CHM; (9) Petition for Leave to Amend filed October 9, 1991 by CHM; (10) Opposition to Petition for Leave to Amend filed October 21, 1991 by BSI.

[2] In view of CHM's failure to demonstrate good cause to amend its proposal to substitute the NBW letter, the Commission held that CHM was also not entitled to rely on the availability of funds based on bank letters from Parkdale Bank and Far East Bank that it obtained after NBW was taken over by Riggs Bank. 6 FCC Rcd at 5192 ¶ 10.

[3] We note that, although the Board did not directly address the adequacy of CHM's financial certification, the ALJ found that CHM failed to demonstrate that it had the requisite reasonable assurance to support Foster's commitment. *See Texas Communications Limited Partnership*, 5 FCC Rcd 1592, 1594 ¶ 18 (I.D. 1990). However, the ALJ declined to disqualify CHM because its certification was also based in part on the bank letter. *Id.* at 1600 ¶ 60.

[4] The cases cited by CHM in support of its argument that no amendment was required are not applicable here. *Petroleum Communications, Inc.*, 1 FCC Rcd 511, 514-15 ¶ 28 (1986), involved an application for cellular radio service and a rule concerning financial disclosure specific to that service. Other cases, *e.g.*, *RKO General, Inc.*, 34 FCC 2d 265, 267 ¶ 5 (1970), cited by CHM which involve the amendment of financial proposals in applications filed prior to initiation of the certification procedures are likewise inapposite. *See Edwin A. Bernstein*, 5 FCC Rcd 2843 n.1 (1990), *aff'd. by judgment*, No. 90-1284 (D.C. Cir. Mar. 8, 1991).

[5] To hold, as CHM contends, that CHM was not required to show good cause for an amendment would have the unwarranted effect of using the certification procedure to allow CHM to evade factual questions regarding defects in its proposal. *See Carol Sue Bowman*, 6 FCC Rcd 4723 ¶ 3 (1991), *citing*, *South Florida Broadcasting Co.*, 94 FCC 2d 452, 454-55 ¶¶ 5-7 (1983). We also reject CHM's argument contesting the applicability of *Aspen FM, Inc.* That case did not make any change in the Commission's long standing requirement that an attempt to modify an applicant's proposal must be supported by good cause. We also reject CHM's attempt to rely on the Commission's decisions in *Northampton Media Associates*, 4 FCC Rcd 5517 (1989), and *Susan Mulkey*, 4 FCC Rcd 5520 (1989), as authority that no amendment is required under the present circumstances. These cases are not inconsistent with our holding here. They merely stand for the proposition that, although an applicant may not certify its financial qualifications and then arrange financing, the applicant need not have contemporaneously prepared *written documentation* supporting its original certification. *See Northampton*, 4 FCC Rcd at 5518-19 ¶¶ 13-14.

[6] We disagree with CHM's argument that the NBW letter must be accepted under the criteria set out in *Erwin O' Conner*, 22 FCC 2d 140, 143 (1970), because no new issues are raised by the letter itself. As discussed fully *infra*, the NBW letter, dated March 22, 1989, and the totality of the circumstances surrounding CHM's introduction of the letter implicates CHM's diligence and candor because, as late as June 1989, CHM failed either to show that it had proceeded promptly to obtain a new bank letter or to bring the new letter to the Commission's attention when BSI questioned its financial qualifications.

[7] We reject CHM's argument that there was nothing to report with respect to ETSB's failure, since the successor bank would continue to honor the letter issued to CHM as an executory contract. The ETSB letter states on its face that ETSB made no contractual commitment to loan funds to CHM, and represented only that ETSB would consider a loan to CHM. Under these circumstances CHM no longer had assurance that a loan would be made after ETSB failed.

[8] CHM's most recent petition for leave to amend its financial proposal, filed October 9, 1991, seeks to make the NBW letter part of its proposal. We will dismiss CHM's petition as moot in light of our decision herein. Moreover, we note that the NBW letter is a nullity since NBW was taken over by Riggs Bank months ago and Riggs has indicated that it does not intend to honor the NBW letter.

[9] We emphasized in *Great Lakes* that the provisions of 47 C.F.R. § 1.229 should be strictly enforced, including the requirement that petitions to enlarge issues rely on evidence that is new and that could not have been reasonably discovered earlier, in order to expedite the hearing process and the institution of new service. *See* 6 FCC Rcd at 4333 ¶ 15.

[10] Likewise, the *Evansville* proceeding provides no support for Texas Ltd.'s allegations concerning the basic qualifications of BSI or SCC. On review, we overturned the Board's disqualification of ESI. We held that, regardless of whether we would credit ESI's organization for purposes of determining ESI's entitlement to comparative integration credit, the record did not support a finding that ESI committed disqualifying misconduct. In this regard, we found no specific evidence of misrepresentation, lack of candor, or abuse of process. *See Evansville Skywave, Inc.*, 7 FCC Rcd _____ ¶ 17 and n.10 (1992). The reversal of *Evansville* eliminates the Board's decision as a factor of probable decisional significance in this case and Texas Ltd. has provided no other specific facts in support of its allegations which would justify further proceedings.

[11] In this regard, Texas Ltd. also cites the *Mableton* proceeding, in which the Board added financial certification issues against an applicant whose limited partner is SCC and which also relies on a letter from Banc One. *See Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 6314, 6321-22 ¶¶ 34-37 (Rev. Bd. 1990).

[12] Because the Board's decision in *Evansville Skywave* did not address the financial issues specified against ESI, we have remanded that case to the Board to consider exceptions concerning those matters. *See Evansville Skywave*, 7 FCC Rcd at ¶ 22. However, even if those issues are resolved against ESI, it would not necessarily establish that BSI's separate financial proposal is defective, and, as noted above, Texas Ltd. has not presented any specific allegations, which in themselves would warrant inquiry into BSI's financial qualifications.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Country Investments Limited Partnership — File No. BPH-0890412MG

For a Construction Permit for a New FM Station on Channel 288C1 in Idaho Falls, Idaho.

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 26, 1992

By the Commission:

1. The Commission has before it for consideration an Application for Review, filed on behalf of Country Investments Limited Partnership (Country), former applicant for a new FM station at Idaho Falls, Idaho, seeking refund of its hearing fee. Country's initial request for refund was denied because the settlement agreement it had entered with its sole competitor had been filed after the Notice of Appearance deadline and, therefore, Country was not entitled to a refund. *See* 47 C.F.R. § 1.1111(c)(1), recently redesignated as 47 C.F.R. § 1.1111(c)(4). The Applicant's petition for reconsideration was denied by the Managing Director, and Country seeks review of that decision.

2. Country states that retention of its hearing fee, notwithstanding the late filing of its settlement agreement, is an arbitrary application of the Commission's rules that will discourage future settlement agreements by competing applicants, contrary to express Commission policy. Country notes that it notified the Commission at the time it filed its Notice of Appearance that the settlement agreement would be submitted immediately following its formal execution. Country also argues that denial of a refund is unjustified in these circumstances because the Commission had only to pass on the merits of the agreement to select the appropriate licensee rather than expend extensive resources to select a licensee through an adjudication.

3. We affirm the decision of the Managing Director. Hearing fees and other fee payments must be timely filed. 47 C.F.R. § 1.1107(a), (b). In the absence of a timely tendered fee payment (or a timely filed settlement agreement), Country's application was subject to immediate dismissal. Upon dismissal, any subsequently filed settlement agreement would have been rendered moot. Thus, because it was unable to timely file a settlement agreement, Country paid its obligatory hearing fee and, thereby, preserved its status as a party to the comparative proceeding in order to protect its interest in the settlement arrangement.

4. The fact that Country in its Notice of Appearance advised the Commission that a settlement agreement would be filed shortly does not justify a refund. Our purpose in dispensing with the hearing fee requirement in the case of timely filed settlement agreements was to provide each competing applicant with an incentive to enter into and timely file such agreements.[1] In establishing the rules which were in effect at the time Country filed its hearing fee, we concluded that any postponement of the filing time for such agreements beyond the Notice of Appearance deadline would not promote settlements, but could result in additional expenditures of resources by the Commission and the applicants. *See Fee Collection Program*, 2 FCC Rcd 947, 966 (1987), *reconsideration denied*, 3 FCC Rcd 5987 (1988). We also found therein that the 20 day period between designation for hearing and the filing of Notices of Appearance was ample time for competing applicants to reach and file their settlement agreements. *Id.* Absent the filing of an actual settlement agreement, we cannot be assured that a final settlement agreement in fact has been entered into. Accordingly, Country has not satisfied the clear requirements of our rules and no refund is warranted.

5. Accordingly, IT IS ORDERED, That the Application for Review filed by COUNTRY INVESTMENTS LIMITED PARTNERSHIP, on December 5, 1991, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] Under our revised rules, we now require competing applicants to file their hearing fee payments by a date certain shortly after filing their applications. *See Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 157-58 (1991), *reconsidered in part*, 6 FCC Rcd 3403 (1991). However, we have retained a provision permitting refunds of hearing fees where competing applicants file a settlement agreement by the time for filing Notices of Appearance. 47 C.F.R. § 1.1111(c)(4).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 18, 1992

Released: May 26, 1992

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

David Noll, Vice President 8310-SP
& General Manager C1-178
Malrite Guaranteed 9203084
Broadcasting, Inc.
Radio Station WEGX-FM
1200 Statler Office Tower
Cleveland, OH 44115

Dear Mr. Noll:

This letter constitutes a Notice of Apparent Liability for a Forfeiture against Malrite Guaranteed Broadcasting, Inc. (Malrite), licensee of Radio Station WEGX-FM, Philadelphia, PA, for the willful violation of Section 73.1206 of the Commission's Rules. Our action is based upon the facts set forth below.

The Commission received a complaint alleging that on December 10, 1991, an employee of Station WEGX-FM placed a telephone call to Ms. Maria Nemeth, recorded, and later broadcast the conversation without first having informed Ms. Nemeth that the conversation was being recorded for broadcast. Based on this complaint, the Commission sent you a letter of inquiry on March 2, 1992. You responded by letter dated March 24, 1992, confirming that the telephone call was placed on December 10, 1991, recorded, and subsequently broadcast on December 11 and 12, 1991.

You confirm that a violation of Section 73.1206 of the Commission's Rules took place in this instance since the called party was not first informed that the conversation would be recorded for broadcast. In defense of the station, you point out that several station employees claim that Ms. Nemeth granted permission to broadcast the subject conversation after it was recorded, but prior to its actual broadcast. Ms. Nemeth claims this is not true. At any rate, this point is irrelevant since the rule was violated when the telephone call was recorded for broadcast without the complainant's prior knowledge of the intended broadcast use of the conversation. Section 73.1206 states: "*Before recording* a telephone conversation for broadcast, or broadcasting such a conversation simultaneously with its occurrence, a licensee shall inform any party to the call of the licensee's intention to broadcast the conversation, . . ." It should be pointed out that Attachment B of your response, the "Nutcracker Rules," states that the "Nutcracker" segment is a regular feature of the John Lander "Nut Hut" show, which is broadcast each morning from 6-10 a.m. In this feature listeners submit ideas for practical jokes to be played on friends or relatives. Then Mr. Lander calls the person and plays the joke on them. Apparently WEGX-FM, in placing these calls and recording them for potential broadcast without the other party's prior knowledge of this intended broadcast use of the conversation, has been repeatedly violating Section 73.1206 of the Commission's Rules. In order to avoid further Commission sanctions in the future, you are cautioned that the "Nutcracker" segment of the John Lander show does not appear to be conducted in compliance with the Commission's Rules.

It appears from the information available to the Commission that Radio Station WEGX-FM, Philadelphia, PA, in apparent violation of Section 73.1206 of the Commission's Rules, recorded and subsequently broadcast the conversation with Maria Nemeth without first informing her that it was being recorded for broadcast. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Malrite Guaranteed Broadcasting, Inc., licensee of Station WEGX-FM, Philadelphia, PA, is hereby advised of its Apparent Liability for Forfeiture in the amount of $5,000.00 for its apparent willful violation of Section 73.1206 of the Commission's Rules on December 10, 1991. The amount was determined by using the criteria set forth in the August 1, 1991, *Policy Statement on Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. The base amount for a Section 73.1206 violation is $5,000.

In regard to this forfeiture proceeding you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

ORDER

Adopted: May 8, 1992; Released: May 11, 1992

By the General Counsel:

1. On April 10, 1992, the Commission initiated a Rule Making proceeding to reexamine its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *Reexamination of the Policy Statment on Comparative Broadcast Hearings*, FCC 92-98 (Apr. 10, 1992) (GC Docket No. 92-52). As part of this Rule Making, the Commission invited comment on a proposal by Jeffrey Rochlis (RM-7740) that it adopt a "finder's preference" in comparative hearings to those applicants who successfully request the allotment of a new frequency through Rule Making. FCC 92-98 at ¶ 29. Rochlis' proposal was originally made in Gen Docket No. 90-264, in which the Commission considered procedural reform of the comparative hearing process. Because Rochlis' proposal was beyond the scope of Gen Docket No. 90-264, the Commission directed that it be assigned a new Rule Making number. *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 3403, 3405-06 ¶¶ 24-28, 33 (1991). At the same time, the Commission also ordered that a petition for reconsideration and alternative petition for Rule Making filed by the NAACP, the League of United Latin American Citizens, and the National Black Media Coalition that proposed several other substantive changes to the comparative criteria designed to enhance minority ownership would similarly be treated as a Rule Making petition. *Id.*

2. It appears that although the Rochlis proposal was assigned a Rule Making number, the proposal of NAACP *et al.* inadvertently was not. On May 1, 1992, the NAACP *et* al. filed pleadings related to this matter: (1) a Time-Sensitive Motion for Stay, and (2) a Motion to Amend Notice of Proposed Rule Making and Reschedule Procedural Dates.

3. Consistent with the Commission's order, *supra*, the pleadings relevant to the NAACP *et al.'s* proposal have been included in GC Docket No. 92-52, and commenters are hereby expressly invited to file comments and reply comments on them. To give commenters an opportunity to examine the NAACP *et al.'s* proposal, the existing comment and reply dates will be extended one week.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to the authority delegated under 47 C.F.R. § 0.251 the Time-Sensitive Motion for Stay and the Motion to Amend Notice of Proposed Rule Making and Reschedule Procedural Dates, both filed May 1, 1992 by the National Association for the Advancement of Colored People, the League of United Latin American Citizens, and the National Black Media Coalition ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

5. IT IS FURTHER ORDERED, That the comment date in this proceeding IS EXTENDED to **June 2, 1992,** and the reply date IS EXTENDED to **June 22, 1992.**

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

GC Docket No. 92-52

In the Matter of

Reexamination of the Policy	RM-7739
Statement on Comparative	RM-7740
Broadcast Hearings	RM-7741

ORDER

Adopted: May 18, 1992; Released: May 20, 1992

By the General Counsel:

1. On April 10, 1992, the Commission initiated a Rule Making proceeding to reexamine its *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 (1965). *Reexamination of the Policy Statment on Comparative Broadcast Hearings*, FCC 92-98 (Apr. 10, 1992) (GC Docket No. 92-52). The comment and reply dates in this proceeding have each been extended by one week and are currently June 2, 1992 and June 22, 1992, respectively. *See Order*, FCC 92I-032 (May 11, 1992).

2. Now before the Commission is a Motion for Extension of Time filed May 14, 1992 by the Media Access Project and the Citizens Communications Center (MAP/CCC). MAP/CCC requests that the procedural dates be extended one month. In their pleading, MAP/CCC assert that the current comment and reply dates are excessively short and that MAP/CCC's time is currently taken up preparing for other important, time-sensitive regulatory and legislative proceedings. According to MAP/CCC, failure to grant the requested extension will result in the Commission being deprived of the views of MAP/CCC and their clients, which include several organizations and citizen's groups.

3. Under the Commission's rules, motions for extension of time are not routinely granted. 47 C.F.R. § 1.46(a). In this regard, it is typical that a number of important, time-sensitive matters are pending before the Commission and Congress. This fact does not constitute a special or unusual circumstance that would justify a further extension of time in this proceeding.

4. ACCORDINGLY, IT IS ORDERED, That pursuant to the authority delegated under 47 C.F.R. § 0.251 the Motion for Extension of Time filed May 14, 1992 by the Media Access Project and the Citizens Communications Center IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Robert L. Pettit
General Counsel

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-570

In the Matter of

Amendment of Section 73.202(b),	RM-7061
Table of Allotments,	RM-7110
FM Broadcast Stations.	
(Lafayette, Tennessee, and	
Campbellsville, Kentucky)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Heartland Communications, Inc. ("Heartland"), licensee of Station WCKQ(FM), Channel 281A, Campbellsville, Kentucky. Heartland seeks reconsideration of the *Report and Order* in this proceeding, 6 FCC Rcd 3289 (1991), which allotted Channel 281A to Lafayette, Tennessee. Lafayette Broadcasting Company, Inc. ("LBC"), licensee of AM Station WEEN, Lafayette, Tennessee, and Hancock Communications, Inc. ("Hancock"), filed oppositions to the petition for reconsideration.[1]

2. Heartland had filed a petition for rule making requesting the substitution of Channel 281C3 for Channel 281A at Campbellsville (RM-7110). This proposal was mutually exclusive with the proposed allotment of Channel 281A to Lafayette (RM-7061). Accordingly, Heartland's petition was treated as a counterproposal in this proceeding. In reply comments, Heartland proposed a resolution of the conflict between the Campbellsville and Lafayette proposals. That plan required the substitution of channels at Munfordville, Kentucky, and Carthage, Tennessee. The *Report and Order* stated that Heartland's resolution constituted an untimely counterproposal, and noted that the resolution would be considered in conjunction with another outstanding petition for rule making. After the *Report and Order* in this proceeding was adopted, a *Notice of Proposed Rule Making* was released seeking comment on four interrelated proposals, including Heartland's channel substitution proposals for Campbellsville, Munfordville, and Carthage. *See Notice of Proposed Rule Making* (MM Docket No. 91-271), 6 FCC Rcd 5534 (1991).

3. In its petition for reconsideration, Heartland argues that the Commission's staff should have considered its alternate channel allotment plan in the context of this proceeding.

4. In a *Report and Order* in MM Docket No. 91-271 adopted simultaneously with this action, we are substituting, *inter alia*, Channel 281C3 for Channel 281A at Campbellsville and Channel 281A for Channel 272A at Carthage, and modifying the authorizations of Station WCKQ(FM), Campbellsville, and Station WUCZ(FM), Carthage, accordingly. Therefore, Heartland's petition for reconsideration is now moot.

5. Accordingly. IT IS ORDERED, That the Petitions for Reconsideration filed by Heartland Communications, Inc. IS DISMISSED.

6. IT IS FURTHERED ORDERED, That this proceeding IS TERMINATED. Authority for this action is contained in Sections 4 and 303 of the Communications Act of 1934, as amended.

7. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

[1] We need not discuss these pleadings, given the resolution of this proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-85

In the Matter of

Amendment of Section 73.202(b),	RM-6406
Table of Allotments,	RM-6789
FM Broadcast Stations.	
(El Dorado and Waldo, Arkansas, and Bastrop, Louisiana)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 14, 1992; Released: May 22, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the substitution of Channel 277C1 for Channel 276A at El Dorado, Arkansas, and the modification of the license of Station KAYZ, El Dorado, to specify operation on Channel 277C1. In order to accommodate this upgrade, the *Notice* also proposed the substitution of Channel 247A for vacant but applied for Channel 277A at Bastrop, Louisiana. 4 FCC Rcd 3725 (1989). Noalmark Broadcasting Corporation, El Dorado Broadcasting Co., and Max Broadcasting Company filed comments. L. Lynn Henley filed a counterproposal. Noalmark Broadcasting Corporation filed reply comments, a response to the Henley counterproposal, and supplemental comments. For the reasons discussed below, we are upgrading Station KAYZ to specify operation on Channel 277C1, and we are substituting Channel 247A for Channel 277A at Bastrop, Louisiana. We are also allotting Channel 256A to Waldo, Arkansas.

2. This proceeding began with the filing of a petition for rule making by Noalmark Broadcasting Corporation ("Noalmark"), licensee of Station KAYZ, El Dorado, proposing the substitution of Channel 277C1 for Channel 276A at El Dorado, and modification of its Station KAYZ license to specify operation on Channel 277C1. Noalmark also proposed the substitution of Channel 247A for Channel 277A at Bastrop, Louisiana. In response to the *Notice*, L. Lynn Henley filed a counterproposal proposing the allotment of Channel 278A to Waldo, Arkansas, as a first local transmission service.[2] In a separate context, El Dorado Broadcasting Co., licensee of Station KLBQ, Channel 257A, El Dorado, Arkansas, filed comments urging that any Channel 277C1 allotment at El Dorado be available for applications from interested parties. Max Broadcasting Company, applicant for the Channel 277A allotment at Bastrop, filed comments indicating no objection to the Noalmark proposal as long as it is afforded cutoff protection in the event it is required to amend its application to specify Channel 247A.

3. After careful consideration of this matter, we are allotting alternate Channel 256A to Waldo, Arkansas.[3] This alternate channel enables us to upgrade Station KAYZ to specify operation on Channel 277C1.[4] In order to accommodate the Station KAYZ upgrade, we are substituting Channel 247A for Channel 277A at Bastrop, Louisiana.[5] We believe that both a first local service at Waldo and an upgraded FM service at El Dorado would serve the public interest.

4. We reject the contention advanced by El Dorado Broadcasting Co. that the Channel 277C1 allotment should be available for general application. Section 1.420(g)(3) of the Commission's Rules specifically authorizes an upgrade to a mutually exclusive higher class channel without affording other interested parties an opportunity to apply for the upgraded allotment. *See also Modification of FM Broadcast Licenses to Higher Class Co-channel and Adjacent Channels*, 60 RR 2d 114 (1986). The existing Station KAYZ license on Channel 276A precludes any other party from applying for a Class C1 allotment at El Dorado, Arkansas. The argument set forth by El Dorado Broadcasting Co. that an upgrade for Station KAYZ would "adversely" affect the ability of Station KLBQ to compete in the El Dorado market does not warrant departure from Section 1.420(g)(3) of the Rules. In a related context, we note that Station KLBQ was granted an upgrade to Channel 254C3 in the *Third Report and Order* in MM Docket No. 84-231. 7 FCC Rcd 470 (1992).

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[1] The community of Waldo, Arkansas has been added to the caption.

[2] Public notice of this counterproposal was given on June 22, 1989 (Report No. 1784).

[3] The reference coordinates for the Channel 256A allotment at Waldo, Arkansas, are 33-23-47 and 93-19-52. This site is 6 kilometers (3.7 miles) northeast of Waldo. Because the underlying counterproposal was filed prior to October 2, 1989, an applicant may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KTUX, Channel 255C1, Carthage, Texas, and Station KMAG, Channel 256C, Fort Smith, Arkansas.

[4] The reference coordinates for the Channel 277C1 allotment at El Dorado, Arkansas, are 33-14-01 and 92-56-27. Because the petition for rule making was filed prior to October 2, 1989, Noalmark Broadcasting Corporation may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station KXSA, Channel 276A, Dermott, Arkansas. This site is also short-spaced to the application site implementing a Channel 276C upgrade for Station KCTO, Columbia, Louisiana. Accordingly, we are serving a copy of this *Report and Order* on the licensee of Station KCTO.

[5] The reference coordinates for the Channel 247A allotment at Bastrop, Louisiana, are 32-46-48 and 91-54-48. Because the petition for rule making was filed prior to October 2, 1989, an applicant may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station KDEW, Channel 247C2, De Witt, Arkansas. Max Broadcasting Company, applicant for the Channel 277A allotment at Bastrop (File No. BPH-880603MQ), will be permitted to amend its application without loss of cut-off protection. In its comments, Max Broadcasting Company requests that in the event it is required to commence construction on a Channel 277A facility at Bastrop, it be reimbursed for the costs of changing to Channel 247A. Inasmuch as the application for the Channel 277A allotment has not been granted, we need not consider this request.

5. Accordingly, pursuant to the authority found in Section 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 6, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

Community	Channel No.
El Dorado, Arkansas	227C3, 241C1, 254C3, 277C1
Waldo, Arkansas	256A
Bastrop, Louisiana	230C2, 247A, 261C2

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Noalmark Broadcasting Corporation for Station KAYZ, El Dorado, Arkansas, IS MODIFIED to specify operation on Channel 277C1 in lieu of Channel 276A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

7. The window period for filing applications for the Channel 256A allotment at Waldo, Arkansas, will open on **July 7, 1992,** and close on **August 6, 1992.**

8. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to KCTO Broadcasting Company, Radio Station KCTO, Box 1319, Columbia, Louisiana, 71418.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policies and Rules Concerning Children's Television Programming — **MM Docket No. 90-570**

Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations — **MM Docket No. 83-670**

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 26, 1992

By the Commission:

I. INTRODUCTION

1. On September 30, 1991, Telecommunications Research and Action Center and the Maryland and Virginia Chapters of the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights (collectively "TRAC") filed a Further Petition for Reconsideration and/or Clarification ("TRAC Petition for Further Reconsideration"), regarding one aspect of our decisions[1] implementing the Children's Television Act of 1990 ("Act").[2] TRAC questions our policy regarding application of commercial limits to short segment children's programs aired on home shopping-format television stations. For the reasons given below, we deny TRAC's Petition and reaffirm our decision that home shopping broadcast stations are subject to the same rules that apply to all other television broadcast stations that air children's programs.

II. BACKGROUND

2. The Act requires that (1) television broadcast licensees and cable operators limit the duration of advertising in children's programming to not more than 10.5 minutes per hour on weekends and 12 minutes per hour on weekdays; and (2) the Commission consider, in its review of television license renewals, the extent to which a television broadcast licensee has adhered to the commercial limits, and the extent to which it has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs. The Act only specifies application of the statutory commercial limits to children's programming on a "per hour" basis. Our initial implementation order, however, applied the limits pro rata to half-hour children's programs, but declined to require proration for programs of shorter duration.[3] On reconsideration, we extended the proration requirement to segments of even shorter duration -- *i.e.*, to any children's program segments of five minutes or longer. We also clarified, in response to a petition for reconsideration by TRAC,[4] that the commercial limits and the programming renewal review requirement imposed by the Act apply equally to all commercial stations, including home shopping stations.[5]

III. DISCUSSION

3. TRAC now petitions for further reconsideration and/or clarification. TRAC maintains that we were unclear in our previous orders regarding the applicability of the commercial limits to home shopping stations. TRAC believes that there is an inconsistency between our statement that home shopping stations must comply with the commercial limits, and our ruling that the commercial limits will be enforced only with respect to program segments of five minutes or longer in duration.[6] TRAC contends that this latter ruling effectively exempts home shopping stations from the Act, because, allegedly, their only programming subject to the Act's limits is under five minutes in length.[7] To avoid this result, TRAC suggests that we may have intended to apply the commercial limits to segments of under five minutes when they constitute the only program segment in a clock hour. If so, TRAC asks that we clarify our policy. Otherwise, it seeks reconsideration and modification of that policy.

4. We do not believe that clarification or modification of our decision, as TRAC requests, is warranted. We reiterate that home shopping stations are and will continue to be subject to the commercial limits on children's programs in the same fashion as all other television broadcast and cable stations.[8] Such equal treatment does not result in a special dispensation for home shopping stations. We further note that home shopping stations cannot meet the Act's requirement to serve children's educational and informational needs by short segment programming alone. All stations, including home shopping stations, will be ex-

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[1] *Report and Order, Policies and Rules Concerning Children's Television Programming and Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations* in MM Docket Nos. 90-570 and 83-670, 6 FCC Rcd 2111 (*"April 12 Order"), Erratum*, 6 FCC Rcd 3535, *reconsideration granted in part and denied in part*, 6 FCC Rcd 5093 (*"Reconsideration Order"), further modified by Order*, 6 FCC Rcd 5529 (1991).

[2] 47 U.S.C. §§ 303a, 303b.

[3] *April 12 Order*, 6 FCC Rcd at 2112.

[4] TRAC Petition for Reconsideration and/or Clarification (filed May 30, 1991, as corrected May 31, 1991) at 3, 9-10.

[5] *Reconsideration Order*, 6 FCC Rcd at 5096.

[6] TRAC Petition for Further Reconsideration at 4.

[7] TRAC acknowledges that home shopping stations present conventional-length or "long-form" children's programs which are run without any advertising. It contends, however, that these segments are exempt from the Act because they contain no commercials. Reply to Opposition of HSN Communications, Inc. to Further Petition for Reconsideration and/or Clarification of TRAC (filed Nov. 13, 1991) at 2-3 & n.2. We reject this argument and find that the Act applies to these programs. Specifically, these programs fully comport with the Act's provisions if their commercial content does not exceed the Act's limitations.

[8] *Reconsideration Order*, 6 FCC Rcd at 5096 n.39.

pected to air standard-length children's programs of a half-hour or longer in duration.[9] These programs are, in turn, fully subject to the commercial limits.

5. We also affirm our earlier conclusion that children's programs of less than five minutes in duration aired on any station, including a home shopping station, will continue to be excepted from application of the commercial limits. As we have previously stated, subjecting children's programming segments of under five minutes to the commercial limits (on a prorated basis) will lead to inordinate difficulties in scheduling public service announcements and other short segments that serve a positive public purpose.[10] TRAC has suggested no countervailing considerations that would lead us to modify the rule either for all television broadcast stations and cable systems, or for home shopping stations in particular.

6. We also find no basis for adopting TRAC's suggestion that we distinguish between short-segment children's programs aired on home shopping stations and those aired on stations with non-advertising formats, so as to apply the commercial limits to programs of under five minutes in only the former case.[11] As noted above, counting hours of home shopping solicitations with children's programming of less than five minutes duration toward the commercial limits could discourage such short-segment children's programming entirely, to the detriment of the public interest.[12] Moreover, the Commission traditionally does not take station format differences into account in formulating regulatory policy.[13]

IV. ORDERING CLAUSE

7. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. §§ 154 and 303, as amended, and the Children's Television Act of 1990, 47 U.S.C. §§ 303a, 303b, the Further Petition for Reconsideration and/or Clarification filed by Telecommunications Research and Action Center and the Maryland and Virginia Chapters of the Washington Area Citizens' Coalition Interested in Viewers' Constitutional Rights IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[9] *Reconsideration Order*, 6 FCC Rcd at 5100-01.

[10] *Reconsideration Order*, 6 FCC Rcd at 5096 n.39. *See also id.* at 5101 (discussing value of short-segment programming).

[11] TRAC Petition for Further Reconsideration at 5 n.2.

[12] Of course, if the advertising in the remainder of the hour is advertising primarily directed at children, the commercial limits would apply. *See Reconsideration Order*, 6 FCC Rcd at 5096-97 (if a station airs a program-length show (of five minutes or longer in duration) consisting of advertising for only children's products, whether that program is subject to the commercial limits depends on whether it is primarily directed to children).

[13] *See generally FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (upholding Commission policy not to conduct renewal review of radio station's format change); *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations*, 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979) (en banc), *rev'd*, 450 U.S. 582 (1981).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 18, 1992

Released: May 26, 1992

Jim Trinity 8330-M
Trinity for U.S. Senate '92 92050190
115 E. Lexington Ave.
Glendale, California 91206

Dear Mr. Trinity:

This is in response to your recent complaint against KPBS, a public broadcast television station licensed to San Diego, California. You state that you are a legally qualified candidate for the Republican Party nomination for the office of United States Senator from California, and that KPBS has excluded you from a proposed debate among the three other Republican Party candidates, in violation of Section 315(a) of the Communications Act (47 U.S.C. Section 315(a)).[1]

You argue the station's actions in excluding you while including one of your opponents, Bill Allen, who, you claim, is not situated significantly higher than you in the polls, constitutes an abuse of good faith and discretion which will result in violations of Sections 315 and 312 (47 U.S.C. Section 312) of the Communications Act and cause you significant harm. You also assert that KPBS has suggested that your candidacy may not be viable. To refute that suggestion, you submit, *inter alia,* the following evidence:

> 1) An official state ballot for the office which includes your name.
>
> 2) A newspaper article which allegedly indicates that you and Bill Allen's candidacy are generally on par in public perception.
>
> 3) Documentation that you have been invited to participate in every other previously held public presentation along with the other candidates as well as numerous other public and private campaign events.

Section 315 of the Communications Act, 47 U.S.C. Section 315, states in pertinent part:

> (a) If any licensee permits a legally qualified candidate for public office to "use" a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --
>
> (1) bona fide newscast,
>
> (2) bona fide news interview,
>
> (3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
>
> (4) on-the-spot coverage of a bona fide news event (including but not limited to political conventions and activities incidental thereto),
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection. 47 U.S.C. Section 315(a).

The Commission has held that debates are exempt from the equal opportunities provision of Section 315 as on-the-spot coverage of bona fide news events. *Chisolm v. FCC,* 538 F.2d 349 (D.C. Cir.), *cert. denied,* 429 U.S. 890 (1976). Moreover, debates may be sponsored or initiated by broadcasters, candidates, third parties, and others. *Henry Geller,* 95 FCC 2d 1236, *aff'd, sub nom., League of Women Voters v. FCC,* 731 F.2d 955 (D.C. Cir. 1983); *WCVB-TV,* 2 FCC Rcd 4778 (MMB 1987). When a broadcaster initiates a debate, it has the discretion to select as participants those candidates that, in the exercise of its good-faith news judgment, it deems most significant. *See, Sonia Johnson and Richard Walton,* 56 RR2d 1533 (1984), *aff'd. sub nom., Johnson v. FCC,* 829 F.2d 157 (D.C. Cir. 1987).

You have presented no information that would call into question the bona fide nature of the proposed debate. You acknowledge, for example, that the other three candidates are ahead of you in the polls.[2] The information provided by you does not demonstrate that the program is not a bona fide news event, *i.e.,* that the participating candidates were not chosen on the basis of their newsworthiness. We, therefore, have no basis for believing that the licensee's selection of participants in the debate was not based upon its bona fide news judgement.

Your complaint also asserts your right, as a candidate for federal office, to reasonable access to KPBS under Section 312(a)(7) of the Communications Act (47 U.S.C. Section 312(a)(7)). Your right to reasonable access does not, however, entitle you to appear on particular programs. *Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act,* 68 FCC 2d 1079, 1091 (1978). Apart from your request to appear on the proposed debate, moreover, you have not indicated that you have requested reasonable access from the station and been refused. As a result, there is no basis for Commission action at this time.

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[1] According the complaint, the debate is to air on May 17, 1992, and the primary election will be held on June 2, 1992.

[2] The poll results in the April 12, 1992, edition of the Orange County Register, submitted with your complaint, indicate that Bill Allen has a favorable response from those polled of 6%, you have 1% or so, and the two remaining candidates have 42% and 45%. The poll also shows that you have an unfavorable response of 4%, while Bill Allen has less than a 1% unfavorable response.

In view of the foregoing, your complaint IS DENIED.

Staff action is taken here pursuant to delegated authority. Application for Review by the full Commission may be requested within thirty days of public notice of this letter (*see* Commission Rule 1.4(b)[47 C.F.R. Section 1.4(b)] by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, must be sent to the parties to the complaint. *See* Commission Rule Section 1.115 (47 C.F.R. Section 1.115).

Sincerely,

Milton O. Gross
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

JOHN D. WORD d/b/a WORD Communications — File No. 28491-CD-P/L-91

For authority to construct a 900 MHz One-Way paging facility in the DPLMS throughout the State of Texas

ORDER ON PARTIAL RECONSIDERATION

Adopted: May 13, 1992; **Released: May 26, 1992**

By the Chief, Mobile Services Division:

I. INTRODUCTION AND BACKGROUND

1. The Mobile Services Division's (MSD) Public Notice of March 25, 1992 listed the grant of the captioned application of John D. Word d/b/a Word Communications (Word). The Word application requested the use of frequency 931.6875 MHz at 9 locations in Texas but the Commission granted the use of frequency 931.0375 MHz instead. On April 24, 1992 Word filed a Petition for Partial Reconsideration. For the reasons discussed below, we are denying the Petition.

II. DISCUSSION

2. Pursuant to Section 22.501(p)(2) of the rules, an applicant can file an application for a 900 MHz frequency and indicate a frequency preference but the Commission will assign the frequency. Word's application requested the use of frequency 931.6875 MHz at nine locations in Texas. Another applicant timely filed an application requesting the use of frequency 931.6875 MHz at Corpus Christi, Texas, one of Word's proposed locations. When two or more applicants indicate a preference for the same frequency, the Commission's policy is to grant a preference to the existing licensee who already has use of the requested frequency in other areas. In this case, the competing applicant at Corpus Christi already had been assigned the use of frequency 931.6875 MHz at numerous other locations throughout the United States. Therefore, in order to provide Word with a common frequency at all nine requested locations and to be consistent with our policy of reassigning the same frequency to an existing licensee, Word was granted the use of frequency 931.0375 MHz. Word now requests reconsideration of the grant of frequency 931.0375 MHz and argues that it is negotiating an intercarrier agreement with the carrier licensed for frequency 931.6875 MHz and therefore it should be authorized to use that frequency. Word has not provided any evidence that an intercarrier agreement has been negotiated and that the other carrier agrees to share the use of frequency 931.6875 MHz.

3. The MSD acted properly in assigning frequency 931.0375 MHz to Word. Reassigning frequency 931.6875 MHz to Word for the eight other locations for which it seeks reconsideration would unnecessarily restrict expansion by the existing licensee if an intercarrier agreement is not reached.

ORDERING PARAGRAPH

4. Accordingly, IT IS ORDERED that the Petition for Partial Reconsideration filed by John D. Word d/b/a Word Communications IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NATIONAL BEEPER, INC.	File Nos. 23846-CD-P/L-88
	23847-CD-P/L-88
For facilities in the	23848-CD-P/L-88
Domestic Public Land Mobile	30478-CD-P/L-89
Radio Service on	
frequency 931.9625 MHz	

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1992; Released: May 26, 1992

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On May 2, 1991, the Mobile Services Division (MSD) sent letters to counsel for National Beeper, Inc. (National) terminating National's authorizations for frequency 931.9625 MHz in Hartford, Connecticut; Norfolk, Virginia; Apex, North Carolina and Richmond, Virginia.[1] National filed a Petition for Reconsideration (Petition) of those terminations. For the reasons set forth below, we deny National's Petition.

II. DISCUSSION

2. National was issued authorizations for the above-referenced stations in 1989. It constructed most of the facilities but could not commence operation. We granted one extension of time to commence service to the public, but we denied a second such request. National filed the subject Petition, arguing that it faces difficulty in securing the funds necessary to complete and implement its paging system. National attempts to justify its request for additional time by claiming that it is not "stacking up"[2] authorizations because it really wants "to be a new entrant into paging operation."[3] National urges us to take judicial notice of a difficult financial climate in considering its Petition. These factors, it concludes, justify an additional extension of time to build its system and reinstate its authorizations. Finally, National argues that, because the Commission's public interest mandate allows it to take judicial notice of the difficult financial climate, the Commission would fail to adequately address the public interest concerns in this case if it failed to formulate a sanction other than the termination currently under reconsideration. National then suggests that the public interest is best met if National continues to hold these licenses and proceeds with its plan to begin operating.

3. Section 22.43(b) of the Commission's rules[4] states in part:

> Extensions [of time] will be granted only if the licensee shows that the failure to complete construction is due to causes beyond his control. No extensions of time will be granted for delays caused by *lack of financing*, lack of site availability, for the assignment or transfer of control on an authorization, or for failure to timely order equipment. (emphasis added)

National has not shown that its second extension request was due to causes beyond its control. While externalities such as market financing conditions may increase the financial burden on a grantee, they do not excuse failure to construct or operate due to lack of funding. The first extension of time granted to National was exceptional and should have provided it with sufficient additional time in which to conform to the rules. It is clear that there is no justification for a second extension. Indeed, at a meeting between National and MSD staff on May 15, 1990, National was informed that no further extensions would be granted beyond the November deadline. Further, National's good faith in not "stacking up" licenses does not justify an extension under §22.43(b).

4. When the Commission promulgates rules, it makes a determination of what best serves the public interest. The Commission, by promulgating Section 22.43(b) of its rules, determined that the public is best served by limiting the time a licensee is allowed to construct a radio station and begin operation, thereby promoting prompt initiation of service to the public. National has not presented any argument which contradicts the public interest finding underlying Section 22.43(b), discussed below.

5. If we were to take judicial notice of the difficult financial climate, it would not change the result in this case. A paging licensee is assumed to be financially qualified to offer paging services to the public when it applies for a license. Although the Commission eliminated the financial qualifications requirement for applicants in 1980, *Elimination of Financial Qualifications in the Public Mobile Radio Services*, 82 FCC 2d 152 (1980), the Commission did not abandon the policy represented by that rule. The Commission said in the same Order that strict enforcement of Section 22.43 of the rules "adequately assures that stations be timely constructed."[5] Thus, National's argument that the public interest would be served if it continued to hold the license until it is able to operate its facilities is meritless. National did not begin to operate its paging system after the first extension of time was granted, and there is no indication that a second extension of time would have yielded a different result. For these reasons, we find that the MSD was correct in terminating the four subject authorizations pursuant to Section 22.43(a)(3) of the rules.

III. ORDERING PARAGRAPHS

6. Accordingly, IT IS HEREBY ORDERED THAT the Petition for Reconsideration filed by National Beepers, Inc. is DENIED; and

7. IT IS FURTHER ORDERED THAT National Beepers, Inc.'s authorizations for stations KNKL231 in Hartford, Connecticut; KNKL234 in Norfolk, Virginia; KNKL235 in Apex, North Carolina; and KNKL331 in Richmond, Virginia, all on frequency 931.9625 MHz, ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Common Carrier Bureau

FOOTNOTES

[1] The authorizations for these locations have the following file numbers and call signs:

Hartford, Connecticut - File No. 23846-CD-P/L-88, Station KNKL231

Norfolk, Virginia - File No. 23847-CD-P/L-88, Station KNKL234

Apex, North Carolina - File No. 23848-CD-P/L-88, Station KNKL235

Richmond, Virginia - File No. 30478-CD-P/L-89, Station KNKL331

[2] This expression is akin to the term warehousing, i.e., holding authorizations for speculative reasons without intending to offer service.

[3] National Beeper, Petition for Reconsideration, at 2 (filed June 3, 1991).

[4] 47 CFR §22.43(b).

[5] Elimination of Financial Qualifications, 82 FCC 2d at 154.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

Virginia	File No. 15245-CM-P-83
Communications,	File No. 15387-CM-P-83
Inc.	File No. 15302-CM-P-83

For Authority to Construct and Operate Multichannel Multipoint Distribution Service Stations on E-group channels at Cedar Rapids, Iowa, Springfield, Massachusetts and Jackson, Mississippi

MEMORANDUM OPINION AND ORDER

Adopted: May 19, 1992; Released: May 26, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced applications of Virginia Communications, Inc. (Virginia) to construct and operate Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Cedar Rapids, Iowa, Springfield, Massachusetts and Jackson, Mississippi areas were selected for qualification review as the result of Commission lotteries. The Committee for Fair MDS Lotteries (Committee) filed post-lottery Petitions to Deny,[1] challenging these applications. Virginia filed Replies.

2. *Pleadings.* In its Petition, the Committee alleges that Virginia, together with fifteen other MMDS applicants,[2] engaged in an orchestrated attempt to skew the Commission's lottery proceedings by the coordinated and systematic filing of virtually identical applications under different corporate names. All sixteen of these applicants filed applications for Cedar Rapids, Springfield and Jackson. The Committee contends that the events leading up to the filing of these "cookie-cutter" applications,[3] the familial[4] or business relationships among certain applicants, the preparation of the applications under the direction and at the expense of Bruce Merrill, and the similarities in technical and other information among the applications, and the Letter of Understanding between Virginia and Bruce Merrill,[5] should lead the Commission to conclude that Virginia failed to disclose the identity of the real-party-in-interest to its applications in violation of Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a). In addition, the Committee alleges these same facts demonstrate that Virginia filed multiple applications in violation of Section 21.901(d)(2) of the Commission's Rules, 47 C.F.R. Sec. 21.901(d)(2), also known as the one-to-a-market rule. The Committee also contends that Virginia failed to disclose its affiliation or relationship to its intended or likely subscriber, Bruce Merrill, in violation of Section 21.900 of the Commission's Rules, 47 C.F.R. Sec. 21.900.

3. In its Replies, Virginia relies "for its response on the Boston Reply, and, if necessary on the arguments contained in the February 21, 1986 Replies to the Committee's February 6 Petitions to the extent they have relevance to VCI's application." Virginia's Replies at 3.

4. *Discussion.* The Court of Appeals for the District of Columbia Circuit has clarified and reaffirmed the Commission's statutorily prescribed two-step process for determining the sufficiency of a petition to deny. *See, e.g., Beaumont Branch of the NAACP v. FCC,* 854 F.2d 501 (D.C. Cir. 1988) (hereinafter cited as *Beaumont); Gencom, Inc. v. FCC,* 832 F.2d 171 (D.C. Cir. 1987). It is well established in these cases that in order to obtain an evidentiary hearing, the proponent of a petition to deny must "first set forth specific allegations of fact sufficient to show...that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. Sec. 309(d)(1). Second, if the petition meets these requirements, then and only then, must the Commission determine whether, on the basis of the application, the pleadings filed, or other matters which the Commission may officially notice, a substantial and material question of fact is presented. 47 U.S.C. Sec. 309(d)(2). If no substantial or material question of fact is presented, no evidentiary hearing need be held. *Citizens for Jazz on WRVR, Inc. v. FCC,* 775 F.2d 392,394 (D.C. Cir. 1985)(hereinafter cited as *Jazz).*

5. The *prima facie* sufficiency determination is to be made on the assumption that the specific facts set forth by the complaining party are true, and without reference to contrary evidence. *Id.* at 397. In other words, the Commission must perform this threshold inquiry on the basis of the petitioner's allegations alone. The Commission is limit-

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[1] In its Petitions to Deny, the Committee incorporated by reference the pleadings filed in *Virginia Communications, Inc.,* 2 FCC Rcd 1895 (1987) (hereinafter cited as *VCI).*

[2] The fifteen other applicants are B.F. Investments, Inc., Champion Industries, Inc., Fortuna Systems Corp., Line of Site, Inc., Mettler Communications, Inc., Microwave Video Services, Inc., Multi-Micro, Inc., Multi-Point Television Distributors, Inc., MWTV, Inc., Paul Communications, Inc., Presco Corporation, Stephen Communications, Inc., Video/Multipoint, Inc., Walter Communications, Inc. and Wireless Services, Inc.

[3] The Committee asserts that Bruce Merrill instigated Virginia's MMDS application submissions, citing Bruce Merrill's statement that "[s]ince a lottery system was proposed...it would be better for various members of the family to file their applications independent of each other." Committee's Petition for Cedar Rapids at 6, no. 13; Committee's Petition for Springfield at 7, n.13.

[4] Bruce Merrill is the husband of Virginia Merrill, the president of Virginia Communications, Inc. Virginia and Bruce Merrill reside in Arizona. Due to that state's community property laws, each spouse is a joint owner of Virginia Communications, Inc. In *VCI,* 2 FCC Rcd at 1898, the Commission directed that each spouse file a certification of separate property for the MMDS authorizations of Virginia Communications, Inc.

[5] This Letter of Understanding states that Bruce Merrill, through his company, Merrill Communications, Inc., also known as MerrillCom, will provide programming services to Virginia, if it is a successful MMDS applicant, in consideration of the pre-filing services performed by Bruce Merrill.

ed to consideration of the petition and its supporting affidavits during this initial inquiry. *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (hereinafter cited as *Astroline)*. In the instant cases, the Committee alleges the apparent existence of real-party-in-interest, one-to-a-market, and affiliation disclosure rule violations. After consideration of the Committee's allegations, as required under 47 U.S.C. Sec. 309(d)(1), we are persuaded that the asserted violations, standing alone, and, if assumed to be true, would sufficiently establish that grant of the subject applications would be *prima facie* inconsistent with the public interest, convenience and necessity. *Id.*, 857 F.2d at 1563, 1573; *see also, Midland Educational Broadcasting Foundation*, 4 FCC Rcd 5207 (Audio Serv. Div. 1989). Proof that Virginia failed to disclose the real-party-in-interest and filed multiple applications would alter the Commission's public interest determination. *See, e.g., David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd 2053 (Comm. Car. Bur. 1988); *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *aff'd as modified*, 102 FCC 2d 288 (1985), *aff'd sub nom. United American Telecasters, Inc. v. FCC*, 801 F.2d 1436 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 2182 (1987).

6. Having found that the petitions to deny comport with the requirements enunciated at 47 U.S.C. Sec. 309(d)(1), we now reach the question of the substantiality[6] or materiality of the facts presented as required by Section 309(d)(2). In determining whether an evidentiary hearing is warranted, the Commission considers the totality of the evidence presented (petitioner's evidence and facts offered in rebuttal). The Committee's allegations with regard to violations of the real-party-in-interest and one-to-a-market rules are based upon the same circumstances,[7] therefore we will consider them together.

7. The test for determining whether a person is a real-party-in-interest[8] is whether that person has an ownership interest in the application, or is or will be in a position, actually or potentially, to control the operation of the station. *San Joaquin Television Improvement Corp.*, 2 FCC Rcd 7004, 7008 (1987); *KOWL, Inc.*, 49 FCC 2d 962, 964 (Rev. Bd. 1974). The one-to-a-market rule prohibits, *inter alia*, the filing of multiple applications.[9] The Committee's allegations of rule violations are based upon evidence that Bruce Merrill directed the preparation of and paid for "cookie-cutter" applications that were filed.[10] The Committee argues that Bruce Merrill, acting through Merrill Communications, "has utilized multiple strawmen in an effort to secure benefits that would not have been available had [Bruce Merrill] filed in [his] own name." Committee Petition at 7. However, in support of Virginia's claim that there were no violations of these rules, Virginia relies upon affidavits.

> The Reply...contained affidavits from Virginia Merrill, President of VCI, from the principals of each one of the targeted applicants, and also from Bruce Merrill, Chairman of MerrillCom. The facts contained in those affidavits and the legal precedent set forth in the Boston Reply establish beyond question that MerrillCom has never had any rights to own or control any of the applicant's MMDS facilities, is not a real party in interest to any of the applications....

Virginia's Replies at 2. The Committee's allegations with regard to Virginia's violations of the one-to-a-market and real-party-in-interest rules are not unique to Virginia's Cedar Rapids, Springfield and Jackson applications. These allegations were considered and rejected by the Commission in *VCI*, 2 FCC Rcd 1895 (1987). In light of Virginia's rebuttal, we find the Committee's unsubstantiated evidence insufficient to establish the existence of real-party-in-interest rule violations or one-to-the-market rule violations. *Id.; Sherry Rullman and Edna Cornaggia*, 2 FCC Rcd 2011 (1987).

8. The Committee also alleges that Virginia violated the affiliation disclosure requirement of Section 21.900 because it failed to submit a statement disclosing the affiliation or relationship between Virginia Communications, Inc. and Bruce Merrill, an intended or likely subscriber. We note that at the time Virginia initially filed its applications, the applications included a copy of the Letter of Understanding between Virginia Communications, Inc. and Bruce Merrill. Thus, the applicant disclosed that Bruce Merrill would be the intended or likely subscriber for Virginia's MMDS stations in Cedar Rapids, Springfield and Jackson. The issue here is Virginia's failure to disclose the affiliation or relationship between Virginia Communications, Inc., the applicant, and Bruce Merrill, the intended subscriber. The terms "affiliation or relationship" have been defined for purposes of Section 21.900 as any

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[6] A substantial fact has been defined as a fact for which "the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[7] The Committee argues that Bruce Merrill, through his company, MerrillCom, as an undisclosed real-party-in-interest was the applicant for more than one MMDS application in Cedar Rapids, Springfield and in Jackson. If true, there would exist violations of both of these rules. *David Laustsen and Broadcast Data Corp.*, 3 FCC Rcd at 2054.

[8] Section 21.13(a) of the Commission's Rules, 47 C.F.R. Sec. 21.13(a), requires that an applicant must fully disclose the real-party-in-interest to the application.

[9] At the time Virginia's Cedar Rapids, Springfield and Jackson applications were filed, Section 21.901(d)(2) provided:

> The E-group channels will be assigned to a single applicant in each area and the F-group channels will be assigned to a different applicant in that area. In such areas, each applicant may submit only a single application for either the E-group channels or the F-group channels but not both. The partners, owners, trustees, beneficiaries, officers, directors or stockholders holding more than one percent of an entity's stock, or any other person or entity holding a similar cognizable interest in the applicant for, or the licensee of, one group of channels in any area, shall not have a cognizable interest in the applicant for, or licensee of, either the same group, or the other group of channels in the same area.

[10] We note that the Committee failed to submit an affidavit to support its allegations pursuant to 47 C.F.R. Sec. 309(d)(1). And, the Committee did not provide the amount of specific facts to substantiate its allegations as were provided by Astroline against the Arch transfer application in *Astroline*, 857 F.2d at 1556. A petition to deny "must show the necessary specificity and support; mere conclusory allegations are not sufficient." *Beaumont*, 854 F.2d at 507.

financial or business relationship whatsoever by contract or otherwise, directly or indirectly, between the carrier and the subscriber, excepting only the carrier-user relationship. *Amendment of Parts 1, 2, 21 and 43 of the Commission's Rules and Regulations to provide for Licensing and Regulation of Common Carrier Radio Stations in the Multipoint Distribution Service,* 45 FCC 2d 616, 618 (1974). The Arizona community property laws vested in Bruce Merrill an ownership interest in Virginia Communications, Inc. at the time the Virginia applications were filed. Virginia clearly violated this rule by failing to disclose the affiliation between Virginia Communications, Inc. and Bruce Merrill. However, we find that there is no substantial or material question of fact which requires an evidentiary hearing with regard to violation of the affiliation disclosure provisions of Section 21.900. *Jazz,* 775 F.2d at 394. For violation of Section 21.900, we determine that a condition will be imposed on any MMDS authorization Virginia obtains for Cedar Rapids, for Springfield or for Jackson. This condition will require that Virginia may not provide service to Bruce Merrill, Merrill Communications, or any entity in which Bruce Merrill is affiliated.

9. In *VCI,* 2 FCC Rcd at 1900, the Commission found that the Letter of Understanding between Bruce Merrill and Virginia "raises questions concerning the applicant's intent to comply with Title II of the Communications Act." *See* 47 U.S.C. Sec. 202(a); *see also* 47 U.S.C. Sec. 201. Virginia is reminded that the Commission imposed in that order a condition on any MMDS authorization Virginia obtains requiring an offering to the public without unreasonable preference or discrimination for sixty days. "During that 60 day period, [Virginia] may not accept Bruce Merrill, MerrillCom, or any entity in which Bruce Merrill is affiliated as a customer-programmer." *Id.*

10. *Ordering Clause.* Having carefully considered all of the pleadings and the evidence submitted by the parties, we find that the allegations raised by the Committee, when read in conjunction with the remainder of the record, are insufficient to raise a substantial or material question of fact. Accordingly, IT IS ORDERED that the Petitions to Deny filed by The Committee for Fair MDS Lotteries ARE GRANTED as herein described and as to all other issues ARE HEREBY DENIED.

11. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. Sec. 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b) of the Commission's Rules, 47 C.F.R. Sec. 1.4(b).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: May 26, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

KGB Incorporated C5-732/MD
Licensee, Radio Station KGB-FM
7150 Engineer Road
San Diego, CA 92111

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended.

On April 24, 1991, after receiving complaints alleging that Station KGB-FM, San Diego, California, may have broadcast indecent language in violation of 18 U.S.C. Section 1464, we asked for your comments concerning certain material broadcast during the "Friday Morning Blow-Out Show" of February 23, March 16, and April 13, 1990, at approximately 8 a.m. Transcripts of the relevant material, taken from transcripts and tapes submitted with the complaints, were attached to our inquiry and are again appended here.

You have replied that the February 23, 1990, broadcast of the song "Candy Wrapper" was an error and that the song was broadcast despite KGB's policy that this particular recording, the cause of previous Commission indecency enforcement actions, should never be aired. You state that the employee responsible was admonished and that the record has been destroyed.

You admit that the written lyrics of the song "Sit on My Face," which aired March 16 and April 13, 1990, are offensive and should not have been broadcast. You contend, however, that the lyrics as aired are difficult to decipher "due to the English accent and the ambient noise that surrounds the performance." You state that, after receiving complaints about it, this record, too, was destroyed.

Section 1464 of Title 18 of the United States Code prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. Section 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

We believe that the subject broadcasts fit squarely within the definition of indecency. They contained patently offensive language concerning sexual activities and organs and occurred at a time of day when children were likely to have been in the listening audience. We have reviewed the recordings of the broadcasts in question and are not persuaded by your apparent contention that the offensive lyrics of the song "Sit on My Face," as actually aired, were not sufficiently understandable to constitute a violation. Moreover, while your asserted policy against the broadcast of indecent material, and particularly the song "Candy Wrapper," is laudable, the implementation of this policy was clearly deficient. This is especially disturbing given the station's acknowledged awareness that "Candy Wrapper" had been found by the Commission to be indecent.

Thus, it appears that on February 23, March 16, and April 13, 1990, Station KGB-FM violated 18 U.S.C. Section 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, KGB Incorporated is hereby advised of its apparent liability for a forfeiture of twenty-five thousand dollars ($25,000).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $12,500 is the base forfeiture for the transmission of indecent or obscene material. The violation in this case is exacerbated, however, because the broadcast of indecent material was repeated and, with respect to the broadcast of the song "Candy Wrapper," was egregious, given the prior Commission determination that that particular material was indecent. *See WIOD, Inc.*, 6 FCC Rcd 3704 (MMB Oct. 26, 1989). Weighing these various considerations, we find that a forfeiture in the amount of $25,000 is appropriate.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

This letter was adopted by the Commission on May 15, 1992.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

ATTACHMENTS

Station KGB-FM, San Diego, CA
"Friday Morning Blow-Out"

MV: Male Voice

February 23, 1990, at 8:37 a.m.

MV: We're going to have a little adjunct to the Friday Morning Blow-Out here. We've had so many requests for this today that we're going to play it right now. This is the Candy Wrapper Song on 101, KGB-FM.

(Song:)

It was another Pay Day and I was tired of being a Mr. Goodbar, when I saw Miss Hershey standing behind the Powerhouse on the corner of Clark and 5th Avenue, I whipped out my Whopper and whispered, Hey Sweettart, how'd you like to Crunch on my Big Hunk for a Million Dollar Bar? Well, she immediately went down on my Tootsie Roll and you know, it was like pure Almond Joy. I couldn't help but grab her delicious Mounds 'cause it was easy to see that this little Twix had the Red Hots. It was all I could do to hold back a Snicker and a Krackle as my Butterfinger went up her tight little Kit Kat, and she started to scream Oh, Henry! Oh, Henry! Soon she was fondling my Peter Paul and Zagnuts and I knew it wouldn't be long before I blew my Milk Duds clear to Mars and gave her a taste of the old Milky Way. She asked if I was into M & M's and I said, Hey, Chicklet, no kinky stuff. I said, Look you little Reese Piece, don't be a Zero, be a Life Saver, why don't you just take my Whatchamacallit and slip it up your Bit-O-Honey. Oh, what a piece of Juicy Fruit she was too. She screamed Oh, Crackerjack. You're better than the Three Musketeers! as I rammed my Ding Dong up her Rocky Road and into her Peanut Butter Cup. Well, I was I was giving it to her Good 'n Plenty, and all of a sudden, my Starburst. Yeah, as luck would have it, she started to grow a bit Chunky and complained of a Wrigley in her stomach. Sure enough, nine months later, out popped a Baby Ruth.

March 16, 1990, between 8 and 8:20 a.m.;
and April 13, 1990, approximately 8 a.m.

Male Chorus:

Sit on my face and tell me that you love me. I'll sit on your face and tell you I love you, too. I love to hear you moralize when I'm between your thighs. You blow me away. Sit on my face and let my lips embrace you. I'll sit on your face and then I'll love you (?) truly. Life can be fine, if we both sixty-nine, If we sit on faces (?) the ultimate places to play,(?) We'll be blown away.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

KEZB, Inc., Debtor
(Donald S. Leslie, Trustee)
(Assignor)

and File Nos. BAL-920228EC and
BALH-920228ED

Paso Del Norte Corporation
(Assignee)

For Assignment of Licenses of
Stations KEZB(AM) and KEZB-FM,
El Paso, Texas

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 27, 1992

By the Commission:

1. The Commission has before it the above-captioned applications (BAL-920228EC and BALH-920228ED) which seek Commission consent to the assignment of the licenses of Stations KEZB(AM) and KEZB-FM, El Paso, Texas from KEZB, Inc., Debtor (Donald S. Leslie, Trustee) to Paso Del Norte Broadcasting Corporation (Paso Del Norte). These applications are unopposed.

2. Paso Del Norte is the licensee of Station KINT-TV (Ch. 26), El Paso, Texas. The acquisition of Stations KEZB(AM) and KEZB-FM by Paso Del Norte will result in a television/radio combination where the Grade A contour of the television station encompasses the city of license of the radio stations. Such television/radio combinations are generally proscribed by Section 73.3555 (b) of the Commission's rules. Accordingly, Paso Del Norte has requested a waiver of the rule under the Commission's "failed station" standard.

3. In *Amendment of Section 73.3555*, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989), the Commission set out standards for reviewing requests for waivers of the rule. The Commission concluded that it would look favorably on waiver requests in the top twenty-five markets, where thirty or more separately owned, operated, and controlled voices would remain after the proposed assignment. Second, the Commission stated that it would look favorably upon requests involving "failed stations" and described such stations as those that have not been operated for a substantial period of time or that are involved in bankruptcy proceedings. 4 FCC Rcd at 1751; *See* Section 73.3555, n.7. Because KEZB, Inc. is in Chapter 11 bankruptcy proceedings in the U.S. Bankruptcy Court for the Western District of Texas, San Antonio Division (Case No. 90-30720), it meets the "failed station" standard. *See Three Star Telecast, Inc.*, 6 FCC Rcd 4410 (1991) and *Great Atlantic Electric Radio Co., Inc.*, 5 FCC Rcd 2935 (1990). Accordingly, the request for waiver of Section 73.3555(b) is granted.

4. We further find that the applicants are fully qualified and that a grant of the application will serve the public interest, convenience and necessity. Accordingly, the applications (BAL-920228EC and BALH-920228ED) are granted effective on the date of adoption of this Order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amherst Telephone Company
Woodhull Community Telephone Company

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for
Independent Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: May 18, 1992; Released: May 27, 1992

By the Chief, Common Carrier Bureau

1. In this order we grant two petitions for waiver of the Commission's equal access rules filed by independent telephone companies (ITCs). In the *ITC Equal Access Order,*[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The *ITC Equal Access Order* provided, however, that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible except at costs that clearly outweigh potential benefits to users of telecommunications services."[4]

3. In this order, we consider the petitions for waiver of the equal access implementation requirements filed by Amherst Telephone Company (Amherst) and Woodhull Community Telephone Company (Woodhull). Each company states that the same interexchange carrier, MCI Telecommunications Corporation (MCI), requested equal access conversion. Pursuant to the Commission's rules, the companies are required to complete equal access conversion within three years of the request date. The petitioners state that, for various reasons, they require additional time to implement equal access.

4. On March 4, 1991, Amherst filed a petition requesting an additional one and one-half years, until January 1, 1995, to implement equal access in its Amherst, Polonia, and Rosholt exchanges.[5] Amherst states that its existing ITT 1210 switching system is nearing the end of both its useful life and its depreciable service life, and the software and hardware upgrades necessary for equal access implementation would be very expensive. According to Amherst, the cost of upgrading its existing system would be approximately $550,000, a burdensome expenditure for a company serving approximately 3,500 access lines. Amherst argues that its resources would be better used and its customers better served if it replaced the existing switch with a "state-of-the-art" switch that will address all of its existing and future needs. According to Amherst, the additional time requested will allow Amherst to seek bids on a new system, order the new system, and obtain, install, and test the equipment. Amherst adds that MCI does not object to the waiver.

5. On May 1, 1991, Woodhull filed a petition requesting an additional nine months, until January 1, 1992, to complete the conversion of its end offices to equal access.[6] Woodhull states that in 1988 it installed a DMS-10 Northern Telcom switch. Although the DMS-10 switch does have stored program capability, Woodhull states that it was advised by the engineer installing the switch that equal access was not necessary. Woodhull states that upgrading its switch to equal access will require an additional nine months and will cost approximately $35,000. Woodhull anticipates that the upgrade will be completed by January 1, 1992. Woodhull states that, had it been aware of MCI's initial request, Woodhull would have implemented equal access at the time the switch was installed to avoid additional costs and time. Woodhull adds that MCI does not oppose an extension to complete the equal access implementation.

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[1] *MTS and WATS Market Structure,* CC Docket No. 78-72, Phase III Order, 100, FCC 2d 860 (1985) (*ITC Equal Access Order).*

[2] *United States v. American Tele. & Tel. Co.,* 552 F. Suppl. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States,* 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.,* 603 F. Supp. 730 (D.D.C. 1984).

[4] *ITC Equal Access Order,* 100 FCC 2d at 875, para. 50.

[5] According to Amherst, MCI claims to have initially requested equal access conversion in March 1988. Amherst states, however, that it was unaware of MCI's request until July 1990 when MCI contacted Amherst regarding the progress of the equal access conversion. MCI agreed to send another letter, dated July 12, 1990, requesting that Amherst implement equal access. Amherst is required to complete the equal access conversion by July 12, 1993.

[6] Woodhull states that MCI apparently sent a letter in March 1988 requesting equal access. Woodhull states, however, that it was unaware of MCI's request until April 1991 when MCI contacted Woodhull to ascertain the progress of the equal access conversion. Woodhull believes that it may have overlooked the MCI letter because it was in the process of installing a new switch during 1988.

6. Based on our review of the record, we conclude that the requested waivers are in the public interest. The petitioners have set forth circumstances justifying their requests, and no one has opposed these waiver requests.[7] In addition, MCI, the sole interexchange carrier requesting equal access, has agreed to the petitioners' proposed new completion dates for equal access conversion. We conclude that the companies have demonstrated that the timetables established by the Commission's rules are not feasible "except at costs that clearly outweigh potential benefits."[8]

7. Accordingly, IT IS ORDERED that the petition for waivers of the equal access implementation requirements are GRANTED to the extent described herein.

Federal Communications Commission

Cheryl A. Tritt
Chief, Common Carrier Bureau

[7] The United States Telephone Association filed comments supporting the waiver requests.
[8] *See ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Application by GE American Communications, Inc. to Replace Satcom IV with Anik D Satellite — File No. 4-DSS-MISC-92

ORDER AND AUTHORIZATION

Adopted: May 4, 1992; Released: May 27, 1992

By the Chief, Common Carrier Bureau:

1. GE American Communications, Inc. (GE) has applied for authorization to operate the Anik D satellite, acquired from Telesat Canada, as an emergency replacement for its Satcom IV satellite. GE was given special temporary authority to operate Anik D in place of Satcom IV and its application was put on public notice as a request for conditional authorization.[1] Hughes Communications Galaxy, Inc. (Hughes) filed supporting comments. For the reasons discussed below, we find it is in the public interest to grant GE's request.

2. GE states that its Satcom IV satellite, which was located at 82^0 W.L., was launched in 1982 and was expected to remain in service until late 1992 when Satcom C-3/C-4 are scheduled for launch as replacement cable satellites. Satcom IV provided such services as regional sports channels, pay-per-view services, ethnic oriented programming, home shopping networks, world news events, specialized programming for the hearing impaired and movie classics. However, in the fall of 1991, GE lost all telemetry control of Satcom IV and was unable to rectify this condition. GE states that Telesat Canada agreed to move Anik D from 111^0 W.L. and operate it on behalf of GE at 82^0 W.L. as an emergency replacement for Satcom IV.[2] GE also states that the use of Anik D will be temporary until permanent "cable satellites" are launched.[3]

3. GE has submitted an interference analysis to substantiate its claim that operation of Anik D will cause no additional adjacent satellite interference than did Satcom IV, despite the fact that Anik D's transponders are more powerful than Satcom IV's transponders. GE states that the satellite operating closest to Satcom IV is AT&T's Telstar 302 at 85^0 W.L. and that it will coordinate the substitution of spacecraft with AT&T. Staff analysis concludes that GE's technical assessment is correct and its proposed operation should not cause any additional interference. AT&T did not comment on or object to GE's request. We note that the burden is on GE, as the licensee of the newly replaced satellite, to coordinate with existing satellites to assure that harmful interference does not occur.[4]

4. In addition, GE states that Telesat Canada, an experienced and technically qualified satellite operator, will continue to provide tracking, telemetry and control services for Anik D pursuant to contract. GE recognizes that as licensee of the satellite, GE will be held responsible to the Commission for the satellite's proper operation and will exercise ultimate control over its operations.

5. Authorizing GE to use Anik D as an emergency replacement will assure continuous service to GE's customers and will thus serve the public interest. GE asserts that it cannot provide replacement service on its own fleet of spacecraft because of lack of excess capacity and that it can serve customers more economically and with less disruption from the 82^0 location. In addition, we agree with Hughes that this conditional authorization is temporary until GE launches Satcom C-3 and C-4. Any continued use of Anik D at 82^0 at any other orbital location after those newer satellites are launched would be subject to future application and authorization.

6. Accordingly, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 CFR 0.291, GE's request for conditional authority to operate Anik D at 82^0 W.L. is hereby granted subject to the following conditions:

(a) This authorization is temporary and will expire upon the successful launch and bringing into operation of GE's Satcom C-3 and C-4 satellites;

(b) The satellite must be moved to its regularly assigned location, 81^0 W.L., to accommodate the launch of other authorized satellites according to the Commission's 2^0 orbital spacing plan;

(c) GE is responsible for the proper operation of the Anik D satellite;;

(d) GE is afforded 30 days from the date of the release of this order and authorization to decline this authorization as conditioned. Failure to respond within that period will constitute formal acceptance of this authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

[1] Letter to Philip V. Otero and Alexander P. Humphrey from Chief, Domestic Facilities Division (October 29, 1991).
[2] GE states it will rename this satellite Satcom IVR.
[3] The "cable satellites" are assigned to 135^0 and 131^0 W.L.
[4] See American Telephone and Telegraph Co., 5 FCC Rcd 1184 (1990) at para. 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File Nos. E-91-44
E-91-45

SOUTHERN SATELLITE
SYSTEMS, INC.
and NETLINK USA,
Defendants.

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File No. E-91-46

UNITED VIDEO, INC.,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted May 19, 1992; Released: May 27, 1992

By the Chief, Common Carrier Bureau:

1. Complainant in the above-captioned proceedings, the National Rural Telecommunications Cooperative (NRTC),[1] by a motion filed January 3, 1992, has petitioned the Commission to dismiss the formal complaints it filed in this matter alleging unlawful discrimination against it[2] in violation of Section 202(a) of the Communications Act of 1934, as amended, 47 U.S.C. §202(a).[3] For reasons stated below, we dismiss NRTC's complaints.

I. BACKGROUND

A. The SHVA

2. In the Satellite Home Viewer Copyright Act of 1988 (SHVA),[4] Congress amended the Copyright Act and directed the Commission to prepare a report on whether discrimination described in Section 119(a)(6) thereof existed.[5] Section 119(a)(6) of the SHVA provides that:

> ... the willful or repeated secondary transmission to the public by a satellite carrier of a primary transmission made by a superstation or a network station and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506 and 509, if the satellite carrier *unlawfully discriminates* against a distributor. (emphasis supplied)

Unlike other terms, the term "unlawfully discriminates" is not defined in the SHVA or clear from its legislative history, except that Congress did note "that neither the Communications Act nor the FCC's current rules bar discrimination against distributors of superstation or network station signals for private viewing".[6] The term "satellite carrier" is defined in the SHVA to mean:

> an entity that uses the facilities of a satellite or satellite service licensed by the Federal Communications Commission, to establish and operate a channel of communications for point-to-multipoint distribution of television station signals, and that owns or leases a capacity or service on a satellite in order to provide such point-to-multipoint distribution, except to the extent that such entity provides such distribution pursuant to tariff under the Communications Act of 1934, other than for private home viewing.[7]

The term "distributor" is defined in the SHVA to mean any entity which contracts with a satellite carrier to distribute secondary transmissions received from the carrier

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[1] NRTC is a national telecommunications organization owned and controlled by a number of rural electric cooperatives and rural telephone systems located across the country. NRTC functions as a clearinghouse for its member cooperatives, who individually distribute "Rural TV" programming services to more than 50,000 home satellite dish (HSD) subscribers. "Rural TV" consists of more than 40 superstations, network stations, and sports, music and other premium channels.

[2] Defendants, directly or through affiliates, provide domestic satellite programming services to HSD owners.

[3] Section 202(a) provides as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[4] Satellite Home Viewer Copyright Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 at 3949 (1988), *amending* 17 U.S.C. § 101 *et. seq.* (Copyright Act).

[5] *See* Inquiry into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 6 FCC Rcd 3312 (1991) (*Second Report*).

[6] H.R. Rep. No. 100-887, Part 2, 100th Cong. 2d Sess. 13, 22 (1998); 1988 U.S. Code Cong. & Adm. News, 5638, 5651.

[7] 17 U.S.C. § 119(d)(6).

either as a single channel, or in a package with other programming, to individual subscribers for a private home viewing, either directly or indirectly through other program distribution entities.[8]

3. In its *Second Report*, the Commission noted that the test used in proceedings under Section 202(a) of the Communications Act is "the only test for unlawful discrimination contained in [that] Act and the Commission is limited to issues within its jurisdiction and expertise by the legislative history accompanying the SHVA." (footnote omitted).[9] The Commission further noted that Section 202(a) does not reach activities of satellite carriers who are not acting as common carriers.[10] It also noted that NRTC had filed the formal complaints here before us and that such complaints "were filed pursuant to Section 208 of the Communications Act, which is available to '[a]ny person... complaining of anything done or omitted to be done by any common carrier subject to this Act, in contravention thereof....'"[11] The Commission further noted that the outcome of the complaints and whether it had jurisdiction under Section 208 over the matter would depend on questions of fact and law that might vary from defendant to defendant.[12] The Commission stated that specific allegations of unlawful activity under the Communications Act would be evaluated in the subject Section 208 complaints and that "[t]he threshold question will be: Is the defendant a common carrier, providing common carrier services, and subject to Section 208?"[13]

B. The Subject Complaints

4. By amended complaints filed on April 26, 1991 in the subject proceedings, NRTC alleged that, in providing domestic satellite services, Southern Satellite Systems, Inc., Netlink USA, and United Video, Inc. (collectively defendants) had discriminated unlawfully against it in violation of the Communications Act, particularly Section 202(a) thereof, by charging it more than they charged operators of cable television systems, satellite master antenna television systems and multipoint distribution systems for alleged like service. Defendants have denied such allegation and asserted that, in the provision of domestic satellite service to owners of home satellite dishes, neither they nor any affiliate is or has been engaged in a common carrier activity.

5. After extensive discovery, NRTC filed a "Motion to Dismiss Complaint for Lack of Jurisdiction" (Motion) on January 3, 1992, stating that it had become clear that defendants, in their relationships with NRTC, were not engaged in activities on a common carrier basis. Accordingly, NRTC asks the Commission to rule that it does not have jurisdiction to apply Section 202 of the Communications Act to the particular conduct of defendants that was the subject of NRTC's complaints. Nevertheless, NRTC has maintained that its Motion was not intended to be a request to withdraw its complaints[14] (even though it has the burden of proof)[15] unless the Commission rules that it has no jurisdiction. In response, defendants contend that NRTC's complaints must be dismissed with prejudice because NRTC now concedes that defendants do not provide service to it as common carriers and such common carriage is an essential element of a violation of Section 202.

II. DISCUSSION

6. Satellite carriers may be engaged either as private or as common carriers in their domestic satellite operations. Common carriage involves holding oneself out to serve the public indiscriminately or being under a legal compulsion to do so, whereas private carriage involves making "individualized decisions, in particular cases, whether and on what terms to deal." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641-42 (D.C. Cir. 1976), *cert. denied*, 425 U.S. 992 (1976). Neither the unlawful discrimination provisions in the Communications Act, *i.e.*, Section 202(a), nor any Commission regulations promulgated pursuant to that Act, require domestic "satellite carriers" as defined in the Copyright Act to be subject to Section 202(a). As the Commission noted in its *Second Report*, a determination of unlawful discrimination in the provision of satellite services in a Section 208 complaint proceeding depends on questions of fact and law that may vary from defendant to defendant.[16]

7. In the instant case, NRTC, following extensive discovery and pleading, has now conceded that defendants are engaged as private, rather than common, carriers in their relationships with NRTC, and has requested that the complaints be dismissed.[17] It is evident that NRTC, which is charged with the burden of proof in these Section 208 proceedings, has not shown and no longer contends that defendants' actions violate Section 202(a) of the Communications Act. Cases in this posture can be and normally are dismissed without further amplification. Nevertheless, as a condition precedent to dismissal of its complaints, NRTC asks that we make an affirmative finding that the Commission has no Title II jurisdiction over defendants as private carriers with regard to the services provided to NRTC as alleged in the complaints. Although we are not bound to issue such a ruling given the position now taken by NRTC with regard to its Section 202(a) claims,[18] we believe that the record supports such a finding.

8. We find that, with regard to defendants' conduct here at issue, no *prima facie* showing has been made that such conduct involved services rendered on a common carrier basis. On the contrary, there is ample support in the record for a finding that, with respect to the conduct about which NRTC has complained, defendants meet neither test

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[8] *Id.* at 119(d)(1).
[9] *Second Report*, 6 FCC Rcd at 3313.
[10] *Id.* at 3316.
[11] *Id.* at 3321.
[12] *Id.*
[13] *Id.*
[14] *See* replies of NRTC filed February 3, 1992.
[15] It is axiomatic that, in a complaint proceeding, the complainant has the burden of establishing a violation of the Communications Act. *See* Section 208 of the Communications Act (complainant must show a common carrier did or omitted to do something contravening a provision of that Act); Section 1.720(b) of the Commission's Rules, 47 C.F.R. § 1.720(b) (pleadings must contain facts which, if true, are sufficient to constitute a violation of the Communications Act or Commission order or regulation).
[16] *Second Report* at 3321.
[17] Motion at 6. Thus, the essential facts to a finding that the Commission should dismiss the subject complaints no longer are in dispute.
[18] *See* footnote 15, *supra*.

for common carriage established in *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) (*NARUC II*). First, it appears that no defendant is holding itself out to serve indifferently all potential users nor is under legal compulsion to do so under the Communications Act or any Commission regulation or order.[19] Secondly, defendants' services are not "such that customers 'transmit intelligence of their own design and choosing'".[20] Rather, it is defendants or their affiliated companies, not their customers, who determine what superstation and network station programming will be transmitted to HSD owners via domestic satellite facilities.

9. Based on the foregoing, it is clear that the defendants' conduct about which NRTC has complained falls outside the scope of Section 202(a) of the Act and that NRTC no longer is alleging facts which if true establish a cause of action under Section 208 of the Act. We conclude, therefore, that NRTC's complaints should be dismissed.[21]

III. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the complaints filed by the National Rural Telecommunications Cooperative on January 17, 1991, as amended on April 26, 1991, ARE DISMISSED with prejudice.[22]

11. IT IS FURTHER ORDERED that NRTC's Motion IS GRANTED to the extent consistent with our action herein and otherwise IS DENIED.

12. IT IS FURTHER ORDERED that defendants' Motions for Judgment filed October 11, 1991, ARE GRANTED to the extent consistent with our action herein and otherwise ARE DISMISSED.

13. IT IS FURTHER ORDERED that these proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[19] *See NARUC II*, 533 F.2d at 608-09; Motion of Southern Satellite Systems, Inc. for Judgment, filed October 11, 1991, at 7-11; Motion of Netlink USA for Judgment filed October 11, 1992, at 7-10; and Motion for Judgment filed by United Video, Inc. on October 11, 1992, at 32-34.

[20] *NARUC II*, 553 F.2d at 609. *See* Motions for judgment of Southern Satellite Systems, Inc., Netlink USA, and United Video, Inc. at 11-14, 11-13 and 36-39, respectively.

[21] In taking this action, we need not and do not reach the issue of the nature and extent of the Commission's authority under Titles I and III of the Communications Act over domestic satellite carrier licensees. We note that bills have been introduced in Congress which would amend the Copyright Act, *e.g.*, S. 2013 and H.R. 3864, and the Communications Act, *i.e.*, S.12. We also note that NRTC is supporting such bills. According to NRTC, S.12 "would require the FCC to stop satellite carrier discrimination" and S.2013 and H.R. 3864 "would give programming distributors like NRTC the right to sue satellite carriers in court for unlawful pricing." *See* NRTC News Release "NRTC Drops Complaints; Lack of FCC Jurisdiction Cited" (Jan. 6, 1992) at 2 (copy attached as Exh. A to response of United Video, Inc. to NRTC's Motion).

[22] Such action is without prejudice to filing a complaint with respect to future conduct concerning domestic satellite services that any defendant might render on a common carrier basis.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MICROBAND CORPORATION OF AMERICA — File Nos. 8828-CM-P-83, 8657-CM-P-83

Applications for Authority to Construct and Operate Multichannel Multipoint Distribution Service Stations at Sheboygan, Wisconsin and Appleton, Wisconsin

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1992; Released: May 27, 1992

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This proceeding addresses pleadings related to the proposed transfer of control of Multichannel Multipoint Distribution Service (MMDS) applications from Microband Corporation of America (hereinafter referred to as MCA) to Family Entertainment Network, Inc. (hereinafter referred to as FEN.) On August 29, 1991, MCA filed change of ownership amendments to the above-referenced MMDS applications which previously had been selected for qualification review by lottery held on April 11, 1990.[1] No oppositions to the proposed ownership change have been filed.

BACKGROUND

2. Four months prior to the Commission lottery, MCA filed for bankruptcy protection under Chapter 11 of the Bankruptcy Act in December 1989. MCA's stated objective was to reorganize into a "financially viable company." Thereafter, by agreement dated July 30, 1991, MCA agreed to assign its MMDS applications at Sheboygan and Appleton to FEN in exchange for recoupment of a portion of the costs and expenses associated with the preparation and prosecution of the two applications. The purchase price for the Sheboygan application to be paid by FEN to MCA upon Commission consent to the proposed assignment would be $2400. Consideration would be the same for the Appleton application.

DISCUSSION

3. *Rule on Application Ownership Changes.* Pursuant to Section 21.29 of the Commission's Rules, 47 C.F.R. §21.29, parties seeking an ownership change must file the proposed amendment, together with a copy of the underlying agreement with the Commission. The Commission, in turn, will grant the application based upon whether the agreement is consistent with the public interest and whether the consideration promised is limited to "those legitimate and prudent costs directly assignable to the engineering, preparation, filing, and advocacy of the application." Section 21.29(e) of the Commission's Rules, 47 C.F.R. §21.29(e). The purchase agreement between MCA and FEN was submitted to the Commission, and the itemized accounting demonstrates that the consideration is reasonable as it is a readily identifiable sum, consistent with what was provided. Therefore, we find that the itemized accounting shows that MCA does not seek to unreasonably profit from the transfer of its MMDS authorizations. In addition, based upon the information before us, we find pursuant to 21.29(e), that the proposed ownership agreement is consistent with the public interest.

4. *Rule on Application Amendments.* According to Section 21.23(b), an application tentatively selected by lottery must first demonstrate to the Commission "good cause" for the amendment prior to its approval. MCA states that severe financial hardships made developing and perfecting additional wireless cable systems impossible. In fact, MCA filed for bankruptcy protection in December, 1989. Under these circumstances, we find MCA has demonstrated "good cause." The concerns indicated are significant and sufficient to support acceptance of this amendment for the change of ownership of the Sheboygan and Appleton applications. *See Kansas City Southern Industries, Inc.*, 3 FCC Rcd 2842 (1988); *Broadcast Data Corp.*, 97 FCC 2d 650 (Rev. Bd 1894); *Mobilfone, Inc.*, 75 FCC 2d 269 (Rev. Bd. 1979).

5. Pursuant to Section 21.23(c), this substantial change in ownership is a "major admendment" and subject to the "cut-off" provisions of Section 21.31, unless it is demonstrated that the ownership change is "for legitimate business purposes, other than the acquisition of applications." Section 21.23(c)(6). As noted, MCA filed these amendments because it was financially unable to go forward with the development of the two stations. Consequently, we find MCA has demonstrated an independent legitimate business purpose for the substantial change in ownership, other than the acquisition of applications. *See Amendment of Parts 1 and 21 of the Commission's Rules and Regulations Applicable to the Domestic Public Radio Services (other than Maritime Mobile)*, 38 Rad. Reg. 2d 363,

[1] MCA was chosen as the lottery winning application for the E-group channels at Sheboygan, WI and for the F-group channels at Appleton, WI. Section 21.23(b) of the Commission's Rules, 47 C.F.R. §21.23(b) provides *inter alia:* "The Commission may grant requests to amend an application... tentatively selected by the random selection process only if a written petition demonstrating good cause is submitted and properly served upon the parties of record...."MCA's application amendment was filed on August 29, 1991, past the permissible period for submitting amendments "as a matter of right" pursuant to Section 21.23(a). An applicant may amend "as a matter of right" up to 14 days, after the date of the public notice announcing the tentative selection.

373 (1976)(hereinafter cited as Part 21 Rulemaking Order). Thus, the ownership amendments are not considered to be major amendments and are not subject to the cut-off provisions of Section 21.31. *See Airsignal International Inc.*, 81 FCC 2d 472, 474 (1981).

6. In accordance with Sections 21.23(b) and 21.23(e), amendments should be served upon parties of record, which includes mutually-exclusive applicants, as well as, those who have filed petitions to deny against the application of a tentative selectee. Thus, service is required, unless sufficient cause is demonstrated to justify a waiver under Section 21.19 of the Commission's rules. One of the primary underlying purposes of the service requirement is to provide actual notice to any potential parties-in-interest of the substitution of one applicant for another so that there is an opportunity to comment on the potential public benefits or detriments of the proposed ownership change and the qualifications of the prospective applicant. *See Part 21 Rulemaking Order*, 38 Rad. Reg. at 372. The Commission has held that a substantial change in ownership is an event which changes the identity of the applicant and requires a statutory public notice and thirty day opportunity for public comment. *Id.* at 372. This statutory duty to inform the public of substantial ownership changes can be accomplished by publishing the information in a Public Notice. *See Airsignal*, 81 FCC 2d at 474. Here, the amendment to the Appleton application was served by mail on all twelve mutually exclusive applicants. All had an opportunity to file a Petition to Deny the proposed amendment, but none did so.[2] Actual notice and formal service of the ownership change to the Sheboygan application was not required as there were no mutually-exclusive applicants. Therefore, the certificate of service filed by MCA sufficiently demonstrates that MCA complied with the service requirements of Sections 21.23(b) and 21.23(e)(1) of the Commission's rules.

CONCLUSION AND ORDERING CLAUSES

7. In summary, we find MCA has adequately complied with the requirements of Section 21.23(b) as to a "good cause" showing and has complied with the service requirements of Sections 21.23(b) and 21.23(e)(1) of the rules. Further, pursuant to MCA's request and Section 21.23(c)(6), we find the ownership amendments will not be treated as newly filed or subject to the cut-off provisions of Section 21.31(e).

8. Accordingly, IT IS ORDERED that the request for leave to amend MCA's MMDS applications for Sheboygan and Appleton, Wisconsin IS GRANTED, and the ownership change amendments ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan, Chief
Domestic Facilities Division
Common Carrier Bureau

[2] We have no record of petitions to deny filed against MCA's applications for Sheboygan or Appleton, Wisconsin. Therefore, the Commission's discussions and orders In re Amendment of Sections 0.291, Delegations of Authority to Chief, Common Carrier Bureau, 7 FCC 2d 353 (1967) and In re Service of Pre-Designation Amendments to Applications, 8 Rad. Reg. 2d 1717 (1967) of the underlying purpose of this service requirement as it applies to parties who file petitions to deny are inapplicable.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 19, 1992

Released: May 27, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

J.C. Maxwell Broadcasting Group, Inc. 8310-MD 91070217
Licensee, Noncommercial Radio Station WMPR(FM)
P.O. Box 31052
Jackson, MS 39206

Attention: J. Charles Evers, General Manager

Dear Sir:

This letter constitutes a Notice of Apparent Liability for a forfeiture of Seven Thousand Five Hundred Dollars ($7,500), pursuant to Section 503(b) of the Communications Act of 1934, as amended, for violations of Section 399B of the Communications Act. It is issued under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

Section 399B of the Communications Act prohibits public broadcast stations from broadcasting advertisements. It defines an advertisement as:

> any message or other programming material which is broadcast or otherwise transmitted in exchange for any remuneration, and which is intended --
>
> (1) to promote any service, facility, or product offered by any person who is engaged in such offering for profit;
>
> (2) to express the views of any person with respect to any matter of public importance or interest; or
>
> (3) to support or oppose any candidate for political office.

47 U.S.C. § 399b. *See also* 47 C.F.R. § 73.503; and April 14, 1986, *Public Notice*.

Because of complaints indicating that WMPR(FM), Jackson, MS, might have violated Section 399B of the Communications Act of 1934, as amended, and related Commission rules and policies, the Mass Media Bureau's Enforcement Division sent you a letter of inquiry dated April 9, 1991. The letter sought specific information concerning underwriting announcements apparently aired on December 5, 1989; April 16-17, 1990; and February 12, 1991; and a remote broadcast on April 28, 1990. (Transcripts of relevant portions of these broadcasts are attached hereto.)

Your answer, dated April 18, 1991, indicated that the violations were inadvertent and would, through intensified attention to these aspects of your broadcast operations, not recur.

After receipt of your answer, the Commission continued to receive complaints about WMPR's underwriting announcements, along with evidence that similar violations continued to occur. A second letter of inquiry, dated June 13, 1991, asked about broadcasts allegedly aired on April 25, May 1-3, and May 13-14, 1991 (see transcripts, attached), and again requested information about WMPR's remote broadcasts from commercial establishments. By answer dated July 3, 1991, you stated that more serious measures were being undertaken to prevent the underwriting violations noted. You stated that the station would no longer engage in the kinds of remote broadcasts we had questioned, for which you had received from $450-$500 each.

Instead, the Commission has received additional complaints documenting other apparent violations since your July 1991 response. While it seems that WMPR made some changes in its underwriting announcements because of the Commission's inquiries, promotional language was not eradicated. Moreover, the recent complaints showed that WMPR had been airing political advertisements (see transcripts) which supported or opposed candidates for political office, contrary to the prohibitions of 47 U.S.C. § 399b(3), *supra*.

Based on the evidence before us, it appears that you have violated Section 399B of the Communications Act and related Commission rules and policies concerning the broadcast of advertisements by noncommercial educational stations. The subject underwriting announcements and remote broadcasts, all apparently aired in exchange for remuneration, contain language promoting the services, facilities, or products offered by persons engaged in such offering for profit (see transcripts 1-3), or support or oppose candidates for political office (see transcript 4). The announcements do not merely identify the underwriter; rather, they contain qualitative and comparative terms, "calls to action," price information, and other inducements for listeners to patronize the commercial entities named, or urge listeners to vote for a particular candidate.

Accordingly, you are hereby advised of your apparent liability for a total forfeiture of Seven Thousand Five Hundred Dollars ($7,500) for your apparent repeated violations of Section 399B of Communications Act, in the manner specified above, on December 5, 1989; April 16-17 and April 28, 1990; February 12, April 25, May 1-3, May 13-14, September 9, and September 17-18, 1991.

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $2,500 is the base forfeiture for violation of underwriting and related limitations on noncommercial broadcasts. The violation in this case is exacerbated, however, because the violations were repeated on numerous occasions between December 5, 1989, and September 18, 1991. Moreover, such broadcasts continued on WMPR(FM) even after you received two separate letters from the FCC that warned you of our Enforcement Division's concern about your possible noncompliance with Section 399B of the Communications

Act. Under the circumstances, we find that a forfeiture in the amount of $7,500 is appropriate for the apparent advertisements.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

TRANSCRIPT 1

WMPR(FM), December 5, 1989

This program was underwritten in part by Robert Williams. Robert Williams is a 17 year veteran of the Blackwell Chevrolet sales staff. Robert Williams has been number one salesman for the last past 13 years. Robert Williams, in connection with Blackwell Chevrolet, offers special incentives for college graduates and first time buyers. For more information about the large inventory for new and used cars, vans, and trucks at Blackwell Chevrolet, contact Robert Williams at 982-2222. That's 982-2222. WMPR welcomes Robert Williams as an underwriter.

A portion of this program has been underwritten by Video World. Jackson and surrounding area, welcome to the all new Video World, at two locations in Jackson, at 2920 Limp Street and 2920 Medgar Evers Boulevard. The staff and management at Video World are offering to the public complimentary memberships and complimentary delivery and refreshments. Video World movie listings consist of movies, such as Batman, The Last Emperor, Mississippi Burning, and Lean on Me. And there is also an adult selection, along with VCRs, Nintendo video cassettes, and much more. For more information, call 354-4413, or 981-2255--that's 354-4413 or 981-2255, Video World. WMPR is proud to have Video World as an underwriter.

A portion of this program has been underwritten by the Name of the Game. On December 17th, live, at the Name of the Game, in Jackson, Mississippi, the King of the Blues and Balladeer, it's none other than Mr., Bobby, Blue, Blair. Bobby Blue Blair. Tickets are available at B.I.P. and Bennett Records (music). It's gonna be two big shows. That's right. Two big shows. The first show is at five p.m. until nine. And the second show from nine p.m. until we get through. And also at that same big show is gonna be a sock-it-to-me, himself, Billy Soul Dunn. For more information, call 362-8414 or 352-0265. A fabulous, exciting, pre-Christmas blues cabaret, featuring Bobby Blue Blair. That's right. Bobby Blair at the Name of the Game. It's a Jesse Springer production. WMPR is proud to have the Name of the Game as an underwriter.

A portion of this program has been underwritten by Bennett's Record Shop and B.I.P. Records where you can find all your great hit music, that R & B, jazz, gospel, and the blues (music). Bennett's Record Shop located at 3109 Medgar Evers Boulevard, and B.I.P. Records, at 2618 Bailey Avenue. Give them a call today at 981-4328 or 981-0696. Bennett's Record Shop. WMPR is proud to have Bennett's Records as an underwriter.

A portion of this program has been underwritten by the G Town Recording Studios. That's right, G Town Recording Studios, located at 406 West Pascagoula Street, here in Jackson, serving you with 24 track recordings, a full service recording and production studio, demos, master productions, 45s, albums, cassettes, tape duplications, professional consultations, artist development, jingle writing. We'll even teach you to be a recording engineer. So if you always wanted to be a star, why don't you be a star at the G Town Recording Studio. Choirs, groups, solos, bands, blues artists. If you have the talent, get in this town, at G Town Recording Studio, 406 West Pascagoula Street, here in Jackson. For more information, why don't you stop by (unintelligible) or call 969-3508. That's 969-3508. WMPR is proud to have the G Town Recording Studio as an underwriter.

WMPR(FM), April 16 and 17, 1990

This program was underwritten in part by Gateway Ford Mercury, Inc. Gateway Ford Mercury, Inc., located at Highway 3 South in the industrial park of Yazoo City, Mississippi. Gateway Ford Mercury, Inc., one of Mississippi's largest dealerships in the Delta area. Gateway Ford Mercury, Inc., offers a complete line of new Ford and Mercury cars, vans and trucks including Grand Mercury, Crown Victoria as well as Lincoln Continental. They also offer quality long-lasting used cars and trucks. The knowledgeable staff and management of Gateway Ford Mercury, Inc., are inviting all the neighbors, friends, farmers and all the people in the surrounding area to visit and inspect their large inventory of automobiles. WMPR welcomes Gateway Ford Mercury, Inc., Highway 3, Yazoo City, Mississippi, as an underwriter.

This program was underwritten in part by Al Williams and Bill Watson Ford....pleased to announce that Al Williams, Mississippi outstanding Ford salesman, is now a member of the Bill Watson Ford family. Al Williams would like to invite all his old friends and customers to come and visit him at Bill Watson Ford, I-55 North of Jackson, Mississippi. For more information call 956-7000, that's 956-7000. WMPR welcomes Al Williams and Bill Watson Ford as an underwriter.

A portion of this program is being brought to you by Community Insurance Services at 2103 1/2 Flynt Street, here in Jackson. If tragedy would strike you or a member of your family today, would you be covered? Maybe it's time for you to call the insurance representatives, Eleanor Bingham or Gloria Bridges at 352-9333. Whether it's church insurance, auto, homeowners policy, life and health or any general insurance need, you need to call 352-9333. Be safe, not sorry. That's 352-9333. Community Insurance Services. WMPR is proud to have Community Insurance Services as an underwriter.

Crystal Pontiac GMC Chrysler Plymouth Dodge is located at 226 Highway 51 South in Crystal Springs, Mississippi. They offer quality long-lasting used cars and trucks including Chevrolets, Fords, Toyotas, Hondas, Cadillacs and Lincolns. Crystal Pontiac GMC Chrysler Plymouth Dodge also offers quality used Chryslers, Dodges and Plymouths. For more information call 354-2886 or 892-1851. WMPR welcomes Crystal Pontiac GMC Chrysler Plymouth Dodge as an underwriter.

TRANSCRIPT 2

WMPR(FM), April 28, 1990

(Excerpts from the "McDonald's community awareness remote")

Voice 1: Double cheese, and a large order of fries, and a strawberry shake, I'm ready for that right now. When I leave here, that's where I'm going, to get _____. Let's go down to McDonald's right now.

Voice 2: Let's go. You want a Big Mac and a large order of fries? Go home and commence the cooking. We're at McDonald's right here, we're having a community awareness remote, we're at McDonald's, we're located at 3903 Hanging Moss Road, corner of Northside Drive, right next to Carl's Plus. . . . And we're doing the _____ here this evening, we're having such a good time. We'd like to thank all the kids that came out and listened to some of these ponderous things we have to say today. If you are riding around right now, why don't you bring your kids by and meet the WMPR episode. We got a lot of them we got (naming WMPR personalities), and we have _____(laughter). Child's voice: I would like to say hello to my grandmama, etc.

Voice 2: We're out of giveaways? All the ice cream is gone? _____ The next person that comes by and says they heard it on WMPR with 2 kids--I will personally buy them a cone of ice cream. (Conversations with people in the restaurant) Next person that drives up on the lot, the next person that comes up on the lot now, I will personally take care of a Big Mac for you.

* * *

(Paraphrasing)

The remote will be here for another twenty minutes or so, but McDonald's is here through the evening (mentioning Ronald McDonald, playground, etc.), and McDonald's does a lot of good work in the community, gets involved with worthwhile causes.

* * *

In wrapping this up, we want to thank Mr. Leroy Walker Jr., who's the president and owner of about 5 or 6 McDonald's here in the city of Jackson, and we'd like to express our appreciation and support for him having WMPR's entire air patrol and practically the entire staff down here today, and we want to thank the hundreds of people for coming out and bringing their children and celebrating the McDonald's community awareness remote--"stay in school and drug awareness remote" here at the McDonald's remote at Hanging Moss Road and Northside drive, and I have with me right now the distinguished manager of this restaurant, and he would like to say a few words to the public. Start by first telling everybody your name, your duties, and anything special you want to say.

Okay, my name is Andy Abrams, I'm the general manager here at Hanging Moss, and hi, that's my lovely fantastic crew, we're here to really serve you, we want to give you hot food, the fastest McDonald's in town, guaranteed you come through here we're gonna have you in and out of here in a minute, guaranteed, and we just really appreciate you guys coming out to see us today, and we appreciate your work with the children and really trying to keep them in school and keep them off that dope because it's really no good and I really appreciate that.

Thank you, that was the general manager himself for McDonald's here at Hanging Moss and Northside Drive. We also want to remind you that McDonald's has some specials on, some meal combo specials, they have it in numerical order, 1,2,3. Of course, they're always always famous for their Big Macs and their cheeseburgers, but they have a bacon double cheeseburger-large fries-large drink, which is number one, then they have a bacon double cheesburger-side salad-medium fries-medium drink, which is number 2, and of course they have . . . [no prices mentioned].

TRANSCRIPT 3

WMPR(FM), February 12, 1991

A portion of this program was underwritten by The Name of the Game. The Name of the Game at 2645 Livingston Road is the place in Jackson for great, live entertainment. Sunday, February 17, be at The Name of the Game to see Benny Lattimore.

Jessie Stringer is doing it again. Another great live show at The Name of the Game. 2645 Livingston Road, Sunday, February 17. It's Benny Lattimore, plus on that same big show, Patrice Monsale Band & Show.

This is a special Valentine's Party at The Name of the Game, so bring your favorite sweetheart. We will provide you with great live entertainment and lots of free champagne . . . The doors open at 3 p.m. so be on hand to see and hear Benny Lattimore's Band & Show and Patrice Monsale. Advance tickets are available now at the Stringer Packert Store or at The Name of the Game. For more information call 362-8414. Don't you dare miss Patrice Monsale's Band & Show and Benny Lattimore at The Name of the Game.

WMPR(FM)
April 25, May 1-3, 1991

. . . Special guest star Blues Pickin, Gene Yellowman G.J. Thompson. The big Mississippi blues festival, Saturday, April 27 at Kickapoo Resort. . . . Gates open at 12 noon, lodge show begins at 1 p.m. and the music starts at 3 o'clock sharp. PICK UP DETAILS AT ALL BEE-BOP RECORD SHOPS, VIP RECORD SHOP AND HEAD CLEANER BEAUTY SHOP. For more information call 601-981-9859. . . .

. . . underwritten by The Name of the Game. Saturday, May 4th at the Kickapoo Resort, the Name of the Game presents Marvin Cease. With special guest star, Bob Rush.

Along with Billy Soulbuzz and the WORLD FAMOUS Soul Queens. . . . Take Highway 49N to Kickapoo Road. In case of rain the show will move to the Name of the Game, 2645 Livingston Road in Jackson. For more information call 362-8414 . . . .

. . . underwritten by Pal's, . . . right here in Jackson. Thursday night Pal's presents the Blues. With the Top Flight Band and show featuring Pat Brown and Eddie Leon. Showtime is 9 p.m. FRIDAY NIGHT IS LADIES NIGHT; ALL LADIES ADMITTED ABSOLUTELY FREE UNTIL 11 P.M. PAL'S, WITH HAPPY HOUR, 5 TILL 8 DAILY. That's Pal's . . . .

. . . underwritten by Southern Beverage Co. of Jackson and Anheiser Busch Inc. Responsible drinking could save a life. Turn your car keys over to a friend who is sober or to a designated driver. . . . Southern Beverage Co. and Anheiser Busch Inc. PROVIDES FINE ADULT BEVERAGES FOR ENTERTAINMENT AND PLEASURE. . .

May 13, 1991

A portion of this program has been underwritten by Tom Wimberly Auto World. NOW HEAR THIS, NOW HEAR THIS! This is your Lincoln-Mercury man, Bill Bedford. That's right, Bill Bedford with Tom Wimberly Auto World, Mississippi. We have . . . previously owned cars with low miles, . . . at Tom Wimberly Auto World, I-55 North in Jackson. For more information CALL US at 956-6060. . . .

May 14, 1991

Funding for this program has been provided in part by Ron Cunningham of Harreld Chevrolet/Olds/Geo in Canton. ALL DAY TUESDAY AND WEDNESDAY, MAY 14TH AND 15TH, RON CUNNINGHAM OF HARRELD CHEVROLET/OLDS/GEO IN CANTON WILL BE HAVING A CUSTOMER APPRECIATION DAY. Every car, truck and van, every new and used vehicle including Chevys, Oldsmobiles, Pontiacs, Cadillacs, Toyotas and Nissans will be available. . . . .

WMPR(FM), July 10-15, 1991

A portion of this program was underwritten by the Merchant Company Restaurant and Lounge. This Saturday, the Merchant Company Restaurant and Lounge is sponsoring its slow dance, featuring Joe Anthony and the Freestyle Band and Show playing some of the best R & B Top 25 music in Jackson. Also, every Friday the Merchant Company Restaurant and Lounge sponsors a pool tournament. The Merchant Company and Lounge, located on . . . .

WMPR(FM), September 18, 1991

A portion of this program was underwritten by Smith Body Shop. Located at . . . Owner Troy Smith is a certified Auto Body Technician with 19 years of experience. Smith Body Shop offers the base coat clear coat Delcron painting system. And the uni-body frame straightening machine. Smith Body Shop also offers free estimates, and insurance claims are welcome. Foreign or domestic. For more information, you can call 957-0910. That's 957-0910. Smith Body Shop.

TRANSCRIPT 4

WMPR(FM), September 9, 1991

A portion of this program was underwritten by the Committee to Support Wayne Dowdy for Governor. Alcorn terminated its athletic director because it had no money to pay his salary, financial problems at Jackson State were caused by state budget cuts, tuition charged students at Valley has gone up dramatically because of state budget cuts and in public schools huge problems have resulted from state budget cuts. Things have gotten worse while Mr. Mabus has been governor for the last 4 years. Ask yourself, are we better off than we were 4 years ago? I am Wayne Dowdy, please give me a chance as your governor. I can work with people. As a sub-committee chairman in congress, I proved I can lead. Together we can build a better future. Wayne Dowdy for Governor. WMPR is proud to welcome the Committee to Support Wayne Dowdy for Governor as an underwriter.

A portion of this program was underwritten by the Committee to Support Ray Mabus for Governor. How long could you keep your job if you missed one day out of every work week? Not long, right? Well, that's just what Wayne Dowdy did. When congress was voting about education Wayne Dowdy was absent, when congress was voting about health care Wayne Dowdy was absent. But when it came time to increase his salary you better believe he was there. Seven times Wayne Dowdy voted to raise his pay all the way to $89,000. Something just isn't right about that. Being Governor of Mississippi is a full time job that requires a full time commitment. Ray Mabus has made that commitment. WMPR is proud to welcome the Committee to Support Ray Mabus for Governor as an underwriter.

This announcement is underwritten by Friends in Support of Anita H. Hall for Hinds County Supervisor District 3. When Supervisor Bennie Thompson and George Smith were fighting for fair representation of minorities on the board of supervisors, only one candidate in the District 3 race joined them in that fight -- Anita H. Hall appeared before the board on April 29, in support of Plan 9. When when the majority of the board would not listen, Anita H. Hall joined Supervisor Bennie Thompson in filing the winning lawsuit that created the new District 3. We know where Wood Brown was during this fight -- he was voting to deny you fair representation. Where were the other District 3 candidates during this battle? Your support is asked for Anita Hall for the candidate for Hinds County Supervisor District 3, who has demonstrated the courage and commitment to serve you. Anita H. Hall, the responsive and responsible candidate. Underwritten by Friends in Support of Anita H. Hall, Supervisor District 3.

WMPR(FM), September 17, 1991

A portion of this program has been underwritten by the Committee to Elect Judge Orin C. Page, Hinds County Circuit Judge, Sub-District 3. Judge Orin C. Page has 12 years experience as a criminal municipal court judge for the City of Jackson and 20 years experience as a practicing attorney here in Hinds County. He attended Morgan State University, Howard University School of Law, and Jackson State University Graduate School of Business. Judge Orin C. Page is a member of St. Paul Lutheran Church here in Jackson, and a Board Member of the Southern District

Lutheran Foundation based in New Orleans, Louisiana. Judge Orin C. Page has 3 years experience as a Special Master and Family Master hearing domestic relations cases in Hinds County Chancery Courts. WMPR is please to welcome the Committee To Elect Judge Orin C. Page, Hinds County Circuit Judge Sub-District 3 as an underwriter.

A portion of this program was under written by the Committee To Support Wayne Dowdy for Governor.

We're here to talk taxes with Governor Ray Mabus. Governor Mabus, with funds needed in education, drug and law enforcement, where will you raise taxes?

Ah, I'd love to tax everybody.

Governor Mabus, does this tax increase include income tax for everybody in Mississippi?

Raise the taxes on the people of Mississippi.

Governor Mabus, do you propose tax increase on prescription drugs and utility bills for all Mississippians?

I'd love to tax everybody.

Governor Mabus, if you're re-elected, what's in store for Mississippi?

Raise the taxes on the people of Mississippi.

What you've just heard was taken out of context. For the past three months, Ray Mabus' advertising people from New York have been taking things out of context. And have distorted the truth about Wayne Dowdy's record. I hope you'll remember that on Tuesday. This announcement has been paid for by the Wayne Dowdy for Governor Committee. WMPR is proud to welcome the Committee to Support Wayne Dowdy for Governor as an underwriter.

This announcement underwritten by the Committee to Support the re-election of Mike Moore, Attorney General. This Tuesday there is someone on the ballot who's earned our support -- Attorney General Mike Moore. Moore is putting people who abuse our elderly in jail, taking on white-collar crime, drug education to protect our kids, and Moore stopped the foot-dragging on judicial elections. Now judges will be elected fairly and honestly. On Tuesday, support someone we can count on -- Attorney General Mike Moore -- a fighter for us. Underwritten by the Committee to support the re-election of Mike Moore as Attorney General.

This program has been underwritten in part by the Committee to Support Steve Patterson for State Auditor. When Steve Patterson stepped down as Chairman of the Mississippi State Democratic Party he made a courageous move. He placed the name of Ed Cole in nomination to be his successor. And Steve Patterson fought for Ed Cole's election as Mississippi's first Afro-American Party Chairman. Steve Patterson doesn't make headlines, he helps us make history and progress. Steve Patterson stands with us. WMPR would like to thank the Committee to Support Steve Patterson for State Auditor.

The following announcement is being underwritten in part by the Committee to Support Peggy Hobson for Hinds County Supervisor District 3.

I'm Peggy Hobson, candidate for Hinds County Supervisor District 3. Jackson voters aren't being treated fairly -- there has been very little cooperation between City and County Government to the expense of its citizens. Our safety grows more uncertain everyday. I'm ready to move forward to improve economic conditions, raise health care standards, and improve the quality of education. And I'm sure you are too. Let's move forward in harmony. Peggy Hobson will not back down. On Tuesday, September 17th, support Peggy Hobson for Hinds County Supervisor District 3 for a better future.

This announcement has been underwritten by the Committee to Support Peggy Hobson.

This announcement underwritten by the Committee to Support Bennie Thompson Hinds County Supervisor District 2. The population has changed in Hinds County, and Bennie Thompson your District 2 Supervisor led the fight to insure the representation on the Hinds County Board changed with it. Hinds County now has new district lines. Bennie Thompson reminds all of you to go out and vote this Tuesday, September 17th. And as you go vote, remember the hard work Bennie Thompson has done and is doing as Supervisor in District 2 to insure fair representation for all citizens on the Hinds County Board of Supervisors. Underwritten by Supporters of Hinds County Supervisor District 2 Bennie Thompson.

A portion of this program has been underwritten by the Committee to elect Roy Lee Davidson.

I'm Roy Lee Davidson, a candidate for Supervisor District 3. For the past 28 years, I have resided in the west Jackson area and have been an active participant in both civic and community affairs. As District 3 Supervisor I will work for programs and for a decrease in teenage pregnancy; better city and county government; increased educational opportunities; quality transportation thoroughfares throughout Hinds County; expanded housing opportunities for the young and old; determent of drug abuse and gang activity; youth programs designed to keep youth off the streets at unreasonable hours. I'm a graduate of Mississippi Valley State. I've done further study at Jackson State University and the University of Kansas. It's no doubt that I'm the best candidate in the race for this position. Please put your support behind a proven leader, educator, businessman, and Christian. And on September 17th, yours for a better Hinds County, yours truly Roy Lee Davidson. WMPR is proud to have the Committee to Elect Roy Lee Davidson as an underwriter.

This program was underwritten in part by the Committee to Support Kerry Prishock for Chancery Clerk.

You can make a difference in how the Hinds County Chancery Clerk's office is run.

(Prishock) The Chancery Clerk has been getting rich off the taxpayers for long enough. It's time we take those tax dollars and put them back to work for you.

The Chancery Clerk's office hasn't kept up with the times. Right now we don't have fair representation in the office that belongs to us -- the people of Hinds County. With your help Kerry Prishock can change that.

(Prishock) I promise to improve the way the Chancery Clerk's office is run. My staff will consist of a true representation of our community.

Kerry Prishock isn't part of the old political system. He won't play favorites. Kerry Prishock pledges that everyone that uses the Chancery Clerk's office will be treated fairly and equally.

I'm Kerry Prishock. Together we can make a difference. WMPR is proud to welcome the Committee to Support Kerry Prishock for Chancery Clerk as an underwriter.

This program has been underwritten by the Committee to Support Ms. Anita H. Hall candidate for Hinds County Board of Supervisors District 3.

I am Anita Hall, candidate Hinds County Board of Supervisors District 3. The responsive and responsible candidate asking for your support on September 17th. Support Anita Hall who has proven that she can work with other Board Members. Anita Hall who has proven that she will step forth, take on those who are not for fair representation. One person, one vote. On September 17th, Anita Hall will provide rides to the pools, please call us at 948-0305. Anita Hall, the responsive and responsible candidate. WMPR would like to take the Committee to Support Anita H. Hall, Hinds County Board of Supervisors District 3.

A portion of this program was underwritten by the Committee to Support Ray Bates, Justice Court Judge District 4 Hinds County. Education includes: Mississippi College BS in General Business degree - 1959; Master of Business Administration Mississippi College - 1969; Master of Hospital Administration - 1978 Mississippi College; and the University of Southern Mississippi Doctoral program. Experience: taught Tort Law, William Carey College; 25 years State service in Administration - retired 23 years; Mississippi Air National Guard, an active member. He is married to the former Ethyl Chapman of Raymond, the current pastor of Puckett and Jones United Methodist Church. Member of American Legion. He will serve you faithfully.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
May 20, 1992

Released: May 27, 1992

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Channel 33 Inc.,	8210-BH
Licensee, Station KFBT	C6-218(90)
3840 S. Jones Blvd.	C3-752
Las Vegas, NV 89103	

Dear Sir or Madam:

This letter constitutes a Notice of Apparent Liability for a forfeiture in the amount of twelve thousand, five hundred dollars ($12,500) pursuant to Section 503(b) of the Communications Act of 1934, as amended, for willful and repeated violation of the anti-lottery broadcast provisions of the United States Code, 18 U.S.C. Section 1304, and the Commission's Rules. This action is being taken by the Chief of the Mass Media Bureau pursuant to the delegation of authority in Section 0.283 of the Commission's Rules.

On August 20, 1990, the Commission sent you a letter of inquiry seeking to determine if KFBT violated the anti-lottery provisions by broadcasting a commercial for "Sam's Town Casino." Information provided to the Commission indicated that such a commercial was broadcast on June 7, 1990, and that it promoted lottery activities by stating: "Sam's Town has two floors of casino excitement and lots of liberal slots." Slot machines typically involve all three elements of a lottery - chance, prize and consideration. Promoting "casino excitement" at a particular casino, in this case "Sam's Town Casino," also promotes lottery activities. The word "casino" may only be used as part of the proper, or business, name of an establishment, and only to promote non-lottery activities at that establishment.

In your response you admit that the subject commercial was broadcast by your station from June 1, 1990, through August 24, 1990. You state that the commercial was aired as part of a barter agreement with an outside producer, and that it aired only during the 7:00 a.m. to 7:30 a.m. time period. You offer no information that would excuse you from this apparent violation.

In view of the foregoing, it appears that Station KFBT willfully and repeatedly violated 18 U.S.C. Section 1304 and 47 C.F.R. Section 73.1211 from June 1, 1990, through August 24, 1990. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, Channel 33, Inc. is hereby advised of its apparent liablity for a forfeiture of twelve thousand, five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Act and the guidelines described in our recently adopted *Policy Statement, Standards for Assessing Forfeiures*, 6 FCC Rcd 4695 (1991), *recon. pending*. Under these standards, $6,250 is the base forfeiture for a lottery violation. Because the violation was repeated, the forfeiture amount is being increased, making the total forfeiture amount twelve thousand, five hundred dollars ($12,500).

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter to "show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. Section 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In Applications of

Shareholders of GAF Corporation (Samuel J. Heyman, *et. al.*) BTCH-880322GF

Application for Transfer of Control of GAF Broadcasting Company, Inc. Licensee of Station WNCN(FM), New York, New York, from Shareholders of GAF Corporation to Newco Holdings, Inc.

GAF Corporation BTCH-880322GG

Application for Pro Forma Transfer of Control of GAF Broadcasting Company, Inc. from GAF Corporation to Dorset Inc.

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1992; Released: May 28, 1992

By the Commission:

1. The Commission has before it: (1) a petition for reconsideration, filed by Listener's Guild, Inc. ("Guild"), requesting reconsideration of the Mass Media Bureau's November 14, 1988 action granting the captioned applications for transfer of control of GAF Broadcasting Company, Inc. ("GAF Broadcasting"), licensee of WNCN(FM), New York, New York, and denying Guild's petition to deny; and related pleadings; (2) a "Supplement" filed March 12, 1990, by GAF Broadcasting; (3) a "Petition to Require Filing of Early Renewal Application" filed May 18, 1990, by Class Entertainment and Communications, L.P. ("Class"), and related pleadings; (4) a "Further Supplement" filed October 4, 1990, by GAF Broadcasting; and (5) a letter of inquiry to GAF Broadcasting, dated December 19, 1990, from the Chief, Mass Media Bureau, GAF Broadcasting's response dated January 22, 1991, and responsive pleadings filed by Guild and Class.[1]

BACKGROUND

2. GAF Corporation ("GAF"), a publicly traded company primarily engaged in the manufacture and sale of specialty chemicals and building materials, filed applications on March 22, 1988, for Commission consent to transfer control of its wholly-owned subsidiary GAF Broadcasting, licensee of WNCN(FM), from GAF's stockholders to a privately held stock company to be owned by a GAF management led group.[2] The applications were granted on November 14, 1988, and the transaction was consummated on March 29, 1989. Samuel J. Heyman ("Heyman") was Chairman, Chief Executive Officer, a director and largest individual stockholder (9.9%) in publicly held GAF and is the Chief Executive Officer, director and 85% stockholder in the newly formed privately held company, now also named GAF Corporation ("GAF II").[3] Heyman was and continues to be the president and a director of GAF Broadcasting. James T. Sherwin ("Sherwin") was Vice-Chairman, Chief Administrative Officer, a director and less than 1% stockholder in GAF and, prior to his conviction on December 13, 1989, was vice-president and a director of the licensee. Prior to October 15, 1990, Sherwin was also Chief Administrative Officer, a director, and 2% stockholder of GAF II.[4]

3. Guild had petitioned to deny the transfer applications, primarily alleging that: (1) GAF had earlier misrepresented in a renewal proceeding its intent to maintain a classical music format; (2) GAF had engaged in age employment discrimination and fraudulent business practices; and (3) Heyman's proposal was premature and the debt that would be incurred by the proposed leveraged buyout would lead to attempts to maximize WNCN's revenues at the expense of service to the public. Guild also maintained that an amendment to the applications notifying the Commission that on July 6, 1988, a federal grand jury had handed down a criminal indictment against GAF and Sherwin for stock manipulation presented further questions as to the applicants' qualifications. The Bureau determined that the matters raised by Guild did not warrant further inquiry and granted the applications. The Bureau declined to consider the indictment inasmuch as it had not ripened into a final judicial determination.

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[1] The pleadings and related documents referred to in items 2-5, above, primarily pertain to then outstanding convictions of GAF Broadcasting's former parent corporation, GAF Corporation, and James T. Sherwin, a former officer and director of both GAF Broadcasting and GAF Corporation, for securities law violations and related wrongdoings. On appeal, the judgments of conviction were reversed and the case was remanded for a new trial. *U.S. v. GAF Corporation, et. al.*, Case Nos. 444, 445, slip op. (2nd Cir. March 18, 1991). A petition for rehearing *en banc* was denied by the court and, on August 9, 1991, the U.S. Attorney's office for the Southern District of New York announced that it would not seek a new trial.

[2] WNCN is GAF's only broadcast interest. To effectuate the corporate acquisition and reorganization, it was proposed that control of GAF Broadcasting would pass to Newco Holdings, Inc. ("Newco"), the privately held stock company, pursuant to a leveraged buyout of GAF's existing stockholders. GAF would be liquidated and the stock of GAF Broadcasting would be transferred to Dorset, Inc. ("Dorset"), an indirect and wholly owned subsidiary of Newco. Thus, GAF Broadcasting would be controlled by the management-led group through Newco and its subsidiary Dorset.

[3] Upon the liquidation of GAF, the licensee's stock was distributed to an indirect, wholly-owned subsidiary of Newco, named Merick, Inc., rather than Dorset. Also, after liquidation of GAF, Newco was renamed GAF Corporation (GAF II).

[4] Sherwin resigned as an officer and director of GAF Broadcasting on December 27, 1989, following the verdicts rendered against him and GAF. He continued to be an officer, director and stockholder in GAF II. However, in Further Supplement, filed October 4, 1990, GAF Broadcasting notified the Commission that, effective October 15, 1990, Sherwin resigned his positions as "director, officer and employee" of GAF II.

4. At the time Guild filed its petition for reconsideration and supplemental pleadings, the charges against GAF and Sherwin, and two of GAF's non-broadcast subsidiaries, were being tried in court.[5] On reconsideration, Guild contends that the Bureau failed to adequately address the allegations that GAF misrepresented its intent to continue a classical music format; that age discrimination should be a disqualifying factor; that the applicant's certification that it was financially qualified may have been improper; and that the Bureau's action in granting the applications was premature. Guild also requests a stay of the effectiveness of the grants pending a determination on its reconsideration request. Finally, it maintains that testimony in the then-pending criminal proceeding implicated Heyman, as well as Sherwin, in the alleged wrongdoing, presenting questions as to Heyman's and GAF Broadcasting's basic qualifications, and that the Commission was not properly apprised of Heyman's status pursuant to Section 1.65 of the Commission's Rules.[6]

DISCUSSION

5. *Format Misrepresentation.* Guild maintains that Heyman was unqualified to acquire "sole control" over GAF Broadcasting because he misrepresented to the Commission, in connection with a 1984 settlement agreement, GAF's intent to continue WNCN's classical music format. The 1984 settlement agreement, between GAF Broadcasting and a competing applicant for WNCN's facilities, resolved a comparative renewal proceeding involving the station. The agreement provided, in part, that "the station will be operated as a classical music format station for five years." Guild contends that the definition of what constituted a "classical music format" was based upon a definition of the form of classical format agreed upon in a 1976 agreement that resolved an earlier renewal proceeding involving the station and to which Guild was a party. The agreed upon form of classical music was allegedly strictly adhered to until Heyman assumed the chairmanship of GAF. Guild argues that the evidence it submitted to the Bureau shows that while GAF was securing WNCN's license renewal in 1984, in part by representing that the agreed upon format would be continued, GAF was, contemporaneously, planning inconsistent and major format alterations. It maintains that the Bureau failed to address the substance of Guild's allegations; that the allegations were not viewed in the most favorable light; and that the Bureau inappropriately required, at the pleading stage, a reasonable degree of certainty that a misrepresentation had occurred. Guild contends that its pleadings contain properly supported and unrebutted allegations of fact which, if true, amount to willful deceit by Heyman and GAF. Since willful deception of the Commission and the public warrants disqualification, Guild concludes, its evidence must be regarded as substantial and material.

6. The Commission has long recognized that broadcast licensees are permitted, but are not required, to enter into agreements with the public concerning aspects of a station's operations. *Agreements Between Broadcast Licensees and the Public,* 57 FCC 2d 42 (1975). Such agreements may contain provisions relating to public interest matters cognizable by the Commission, as well as to matters that are not of regulatory concern. Provisions in agreements dealing with matters that are within the scope of Commission regulatory concern have been viewed as representations to the Commission to be evaluated and enforced as are all promises of future performance; provisions relating to matters which are not within the Commission's regulatory ambit are not enforced by us. *Id.* While some programming matters have traditionally been viewed as falling within the scope of the Commission's regulatory functions as a cognizable public interest duty on the part of a licensee, entertainment formats have been viewed differently. The Commission neither defines nor enforces the "public interest" in the commencement or discontinuance of radio entertainment formats. We have determined that the marketplace is the best way to allocate entertainment formats and that any scheme regulating such formats would be "... counterproductive in terms of maximizing the welfare of the radio listening public, administratively a fearful and comprehensive nightmare, and unconstitutional as impermissibly chilling innovation in radio programming." *Development of Policy Re: Changes in the Entertainment Formats of Broadcast Stations,* 60 FCC 2d 858, 865-66 (1976); *recon. denied,* 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listener's Guild v. FCC,* 610 F.2d 838 (D.C. Cir. 1979), *rev'd,* 450 U.S. 582 (1981). Further, we recently decided that since the Commission has eliminated detailed programming proposals from the renewal and other application processes and no longer applies a "promise versus performance" standard to such matters, we will now not enforce private contractual agreements relating to other programming matters, as well. *See First Report and Order* (Abuses of the Renewal Process), BC Docket No. 81-742, 4 FCC Rcd 4780 (1989), *aff'd on recon.,* 5 FCC Rcd 3902 (1990); *Report and Order* (Abuses of the Commission's Processes), MM Docket No. 87-314, 5 FCC Rcd 3911 (1990).

7. Thus, since at least 1981, when the U.S. Supreme Court affirmed the Commission's policy of not regulating radio entertainment formats, any representation in an agreement pertaining to the preservation of a particular format is properly construed as a representation to other parties to the agreement and not as an enforceable representation to the Commission. Therefore, the Commission is not the forum in which to adjudicate the issue of whether the provision in the WNCN 1984 settlement agreement, providing for WNCN's operation as a classical music format station, has been breached.[7] The matter is one of a private contractual nature to be settled privately or in the courts. Although renewal licensees and compet-

[5] Ultimately, three trials were held. The first ended in a mistrial without going to the jury. In the second trial, the jury was unable to reach a decision. The third trial resulted in the acquittal of GAF's two non-broadcast subsidiaries, but in guilty verdicts against GAF and Sherwin. Those guilty verdicts have now been reversed on appeal and there will not be another trial.

[6] Section 1.65 provides that applicants are responsible for the continuing accuracy and completeness of information furnished in pending applications.

[7] We also find no legal or policy reason for concluding otherwise on the basis that the provision at issue arose in the context of a settlement agreement between the licensee and a competing renewal applicant rather than between the licensee and a citizens' group that was not an applicant.

ing renewal applicants are required to submit settlement agreements to the Commission for our approval,[8] we are concerned only with agreement terms that are relevant to our decision making process. Other provisions are not subject to enforcement by the Commission merely because they are included in the agreement.

8. Guild claims that it is not seeking enforcement of the format preservation provision and that the issue here is the willfulness of Heyman and GAF's conduct in making commitments which they were planning to breach, and allowing the Commission to rely on such commitments in order to secure renewal of WNCN's license. In this regard, we note that approval of the settlement agreement was not predicated on GAF's commitment to operate WNCN with a classical music format. In an affidavit required to be submitted with the 1984 agreement, in which GAF Broadcasting sets forth its reasons as to why it considered the agreement to be in the public interest, GAF Broadcasting represented that the agreement "... would conserve the resources of the parties and the Commission and would enable GAF Broadcasting to devote its full attention to the operation of WNCN." This is in contrast to the separate affidavit filed on behalf of the dismissing competing applicant who added that, in addition to the same factors represented by GAF Broadcasting, the public interest would be served because "it would assure the public in the WNCN listening area of a highly valued classical music facility." The presiding judge found that the public interest would be served by the agreement's approval since it "will result in the earlier resolution of the matter at hand, thereby conserving the resources of all the parties involved in this proceeding." The presiding judge did not rely on the format preservation commitment.[9]

9. Finally, although we eschew Guild's attempt to embroil the Commission in precisely the kind of burdensome inquiry involving variations within format types which long ago was determined as not being germane to our public interest concerns, we also find that Guild's format allegations do not raise a substantial factual question that GAF made willful misrepresentations to the Commission and therefore that this application should be designated for hearing.[10] Guild's claim of misrepresentation hinges on its contention that, subsequent to GAF's telling the Commission it would maintain a classical music format, GAF in fact effectuated radical format changes. Guild supported its allegations with references to younger announcers, a different "pace and tone," reduction of the number of longer or vocal selections, restrictions to the playlist, repetition of popular favorites, "loose" commercial standards, "experiments" with new age music and other non-classical programming, and station promotions. Petition to Deny, at Exhibit B (affidavit of T'ing Pei) and Exhibit C (affidavit of Joe Manzano). Further, in a transcript submitted by Guild of the program "Inside the Music," which aired on WNCN on December 24, 1984, WNCN's program director and general manager are discussing what they refer to as major formatic changes at WNCN and what they describe as "the Good Life" format. GAF, however, responds that GAF in fact maintains a classical music format and that Guild actually complains about particular selections aired, the announcing style, and the manner of station promotions. We agree. It is clear that the changes referred to in the transcript concern alterations within the context of the station's generic classical music format. The station personnel point, among other things, to factors which have made other types of stations successful, *e.g.* positioning of music and format execution, and conclude that "many of these concepts can be translated correctly and in worthwhile ways to a classical format" and that WNCN is trying to "use some of the concepts which are viable in contemporary radio today and translate them to a classical music format." Thus, Guild has presented no probative evidence of an abandonment of a classical music format as distinguished from a change in style or, at most, an erosion in the "purity" of classical music form preferred by Guild.[11] Inasmuch as WNCN's programming continued to be "classical music" as distinguished from an alternative format, Guild has not presented sufficient evidence to raise a substantial factual question that GAF and Heyman deliberately and willfully misled the Commission in 1984 as to their intention to maintain a classical music format. Contrary to Guild's assertion, we have thus not required it at the pleading stage to meet a higher evidentiary standard.

10. *Age Discrimination.* Guild also contends that GAF is unfit to hold a broadcast license because it engaged in employment discrimination. Specifically, Guild asserts that

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[8] Section 311(d), Communications Act; Section 73.3523 of the Rules. *See also* Section 73.3524 of the Rules.

[9] *GAF Broadcasting Company, Inc.*, (BC Docket Nos. 82-37, 372), FCC 84M-2883, released June 26, 1984.

[10] Allegations of misrepresentation are, of course, material to licensee qualifications and the public interest in allowing a transfer, and we therefore focus here on the "substantiality" of the ultimate factual question of whether GAF intentionally made misrepresentations to the Commission. *See Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394, 395 (D.C. Cir. 1985). In light of our determination that no substantial factual question is raised, *see* 47 U.S.C. Sec. 309(d)(2), it is a moot issue whether Guild has satisified the requirements of Section 309(d)(1) of the Communications Act regarding a *prima facie* case, and we do not separately address that question. *See Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d at 396.

[11] This conclusion is supported by an examination of Exhibit B(1) of Guild's petition to deny which consists of the 1984 settlement agreement. The agreement provides, in pertinent part, as follows:

> 3. So long as GAF directly or indirectly controls the licensee of WNCN, the station will be operated as a classical music format station for five years.....
>
> 10. This agreement contains the entire agreement between the parties with respect to the dismissal of Classical's application and the settlement of the pending comparative proceeding, and supersedes all negotiations, representations, warranties, commitments, offers, contracts and writings of or between the parties prior to the date thereof....

The agreement, which did not further define what constitutes a "classical music format," superseded the 1976 agreement and representations made therein to continue a more specifically defined classical music format. The issue of whether the 1984 agreement was meant to implicitly encompass the definition of a classical music format specified in the 1976 agreement (which expired in 1981) is more appropriately answered by private contract law.

under Heyman, GAF fired all of its over 40 year old on-air staff in order to attract younger listeners to its alleged new format. The Bureau ruled that inasmuch as the Commission's prohibition against discrimination as set forth in Section 73.2080 of the Rules does not list age, such discrimination would be treated as non-FCC misconduct. Guild now argues that it was wrong to classify age discrimination as non-FCC misconduct, that there is precedent recognizing it as sometimes broadcast related, citing *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583, 593 (Rev. Bd. 1982), and that there is no sound policy reason to distinguish age from other employment discrimination otherwise prohibited under Federal law. According to Guild, the rationale underlying the Commission's equal opportunity employment rules applies to age discrimination, which can adversely affect a station's programming. Guild further asserts that GAF's actions were deliberate and flagrant and that it did not even respond to Guild's discrimination allegation. Consequently, Guild contends, GAF's employment policy warrants direct scrutiny by the Commission, even in the absence of an adverse adjudication by another agency.

11. Guild's allegation is based on an affidavit by Joe Manzano, a former announcer at WNCN. Mr. Manzano's employment at the station was terminated on February 1, 1988. His charge of age discrimination was set forth in an affidavit filed almost three months later in support of Guild's petition to deny. He alleges that he and other announcers over the age of 40 were discharged and replaced with younger individuals in attempts by the station to attract a younger listening audience. Based on Mr. Manzano's affidavit, Guild contends that GAF's employment policy warrants direct scrutiny by the Commission, even in the absence of an adverse adjudication by another agency.

12. Section 73.2080(a) of the Commission's rules provides, in pertinent part, that "... no person shall be discriminated against in employment... because of race, color, religion, national origin, or sex." However, discrimination in employment based on age,[12] which is the basis for Guild's allegations, is not expressly covered in the EEO rules pertaining to broadcast licensees.[13] Moreover, the Commission's equal employment opportunity rules focus largely on systemic discrimination. *See Amendment of Broadcast Equal Employment Opportunity Rules and FCC Form 395*, 76 FCC 2d 86, 98 (1980), *reconsideration denied*, 76 FCC 2d 299 (1980). Individual complaints of employment discrimination, like the one advanced by Mr. Manzano, are not investigated by the Commission in the first instance. Instead, the Commission generally refers those complaints to the Equal Employment Opportunity Commission (EEOC) pursuant to a Memorandum of Understanding (MOU) between the agencies.[14] Accordingly, we believe that, in the circumstances, the more appropriate course of action is to refer Mr. Manzano's affidavit to the EEOC. As a general matter, the EEOC is far better equipped than this agency to make an informed decision as to whether Mr. Manzano's allegations concerning age discrimination raise issues under the Age Discrimination in Employment Act. Pursuant to the MOU, therefore, we will refer Mr. Manzano's affidavit to the EEOC as an individual employment discrimination complaint, and this order will serve to notify GAF Broadcasting of this action. We will further require GAF Broadcasting to notify us immediately of the final determination by the EEOC. At that time, we will take whatever action we may deem appropriate as a result of the EEOC's final determination. *See e.g., Washington Radio, Inc. (WTOP)*, 88 FCC 2d 1200, 1202 (1982).

13. *Financial Qualifications.* Guild also contends on reconsideration that information subsequently obtained from the January 19, 1989 GAF Proxy Statement/Prospectus ("Statement") filed with the Securities and Exchange Commission ("SEC"), as well as press reports concerning alleged GAF statements, establish that the applicant's financial certification was false when made.[15] Guild argues that even if the necessary leveraged buyout financing is arranged, the applicants' failure to provide the particulars in the transfer applications and the willingness to falsely certify the availability of sufficient funding provide additional evidence of lack of character.

14. The Statement filed with the SEC does not substantiate Guild's claim that the applicants misrepresented their financial qualifications. Specifically, Guild references language on page 23 of the Statement which, it contends, confirms the absence of the "customary letter of confidence from the proposed underwriters of subordinated debt." Examination of a copy of the Statement, at page 23, however, reveals that on January 19, 1989, "Drexel Burnham also indicated that Drexel and Merrill Lynch continued to be *highly confident* of their ability to complete arrangements for the financing." (emphasis added). The document further indicates that "nothing had come to the attention of Salomon which Salomon believed would materially impede the financing."[16] Next, Guild cites to pages 81-83 of the Statement to indicate that the applicants may not be able to satisfy preconditions of bank financing, particularly by refinancing or repurchasing outstanding

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[12] *See* Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Sec. 621 *et seq.*

[13] In implementing requirements of the Cable Communications Policy Act of 1984, 47 U.S.C. Sec. 554, however, the Commission's cable EEO rules were amended to include a prohibition against age discrimination. *See* 47 C.F.R. Sec. 76.73. Also, the Commission's Memorandum of Understanding with the EEOC, *infra*, note 14, was revised to include cable system operators and to include a corresponding prohibition against age discrimination. *See Amendment of Part 76 to Implement the Equal Employment Opportunity Provisions of the Cable Communications Policy Act of 1984*, 102 FCC 2d 562, 615 (1985).

[14] *Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission*, 70 FCC 2d 2320 (1978). Under the MOU, the Commission acts as a receiving agency for the EEOC for charges of individual employment discrimination and forwards such charges to the EEOC for its investigation and resolution. The date of filing of the charge with the Commission is deemed the date of filing with the EEOC. (Title VII of the Civil Rights Act requires that charges be filed within 180 days of the alleged discrimination. *See* 42 U.S.C. Sec. 2000(e); 29 C.F.R. Sec. 1601.13).

[15] The newspaper accounts referenced by Guild do not constitute affidavits of the facts by persons with knowledge of the facts stated there or copies of judicial or administrative proceedings of which the Commission can take official notice. *See News International, PLC*, 97 FCC 2d 349, 358 (1984).

[16] Salomon Bros., Inc., Drexel Burnham Lambert Incorporated, and Merrill Lynch Capital Markets are described in the summary to the Statement as financial advisors.

debentures. However, the Statement indicates (pages 82-83) alternative plans to obtain consent of debenture holders to amend, to issue letters of credit, and to defease the underlying bonds when necessary. In light of the above, it does not appear that the applicants have misrepresented to the Commission the availabilty of sufficient funds as certified. Since they are required to make a full financial disclosure to the SEC, it would not have been unreasonable or unusual to couch their filing in contingent, cautionary, or qualified language. That the applicants' financing was not 100 percent guaranteed does not automatically give rise to a financial certification/misrepresentation issue. Rather, the instant case is analogous to *MacFadden Acquisition Corp.*, 104 FCC 2d 545, 567 (1986) (*"MacFadden"*), in which the Commission indicated that a financial advisor's statement that it was "highly confident" as to sale of debentures and the availability of bank financing was a valid demonstration of financial qualifications, citing *Advanced Mobile Phone Service, Inc.*, 91 FCC 2d 512, 517 (1982). In *MacFadden*, the Commission went on to state that a bank commitment for 25 percent of necessary funding plus its "best efforts" to obtain the remainder from other participating banks combined with the financial advisor's assurances provided the required "reasonable assurance that the necessary funds will be available." *MacFadden*, 104 FCC 2d at 568. *See also Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117, 1119-20 (D.C. Cir. 1978). Thus, the Commission has previously determined that opinions by investment companies experienced in raising funds for "buy-outs" or tender offers can be the basis for satisfactorily demonstrating that proposed funding will be available to satisfy financial qualifications.

15. The Bureau also rejected Guild's assertion that the Commission should consider the financial impact of the GAF buyout on the applicants' ability or inclination to program WNCN, characterizing Guild's contention as "speculative." The Commission's general policy is not to interfere with a company's capital structure or second guess the financial community or investors which believe that the surviving company in corporate takeovers or buyouts will be financially strong enough to repay debt. *See Tender Offers and Proxy Contests*, 59 RR 2d 1536 (1986), *appeal dismissed sub nom. Office of Communications of the United Church of Christ*, 826 F.2d 101 (D.C. Cir. 1987). Thus while we believe, as a general principle, that we should not become involved in reviewing corporate financing decisions, specific allegations of fact in particular cases may warrant such an inquiry under our public interest mandate. *See MMM Holdings, Inc.*, 4 FCC Rcd 8243 (1989). Here, however, Guild's allegations are speculative and fail to present a substantial factual question regarding the debt to be incurred and future service to the public.

16. *Criminal Proceeding: Section 1.65 Compliance.* Based on the scope of the criminal indictment against GAF and Sherwin and revelations at the trials, Guild contends that GAF failed to comply with Section 1.65 of the Rules which provides that applicants are responsible for the continuing accuracy and completeness of information furnished to the Commission in conjunction with their applications. GAF informed the Commission of the federal criminal indictment in an amendment to its application on July 27, 1988, eleven days after the indictment was handed down. The amendment informed the Commission that "a criminal indictment against GAF and its Vice Chairman, James T. Sherwin, was handed down by a Federal grand jury... The indictment alleges generally that, in the fall of 1986, GAF and Sherwin sought to manipulate the price of Union Carbide stock owned by GAF to the corporation's advantage."[17] Guild asserts that the amendment was not sufficiently complete in that it neglected to describe the precise nature of the criminal charges, which included conspiring to falsify records and to deceive and defraud investors. Guild also maintains that newspaper accounts of the trial revealed that Heyman was considered by the government to be an unindicted coconspirator and that it was likely that GAF and Heyman had been informed of this fact prior to trial. Also, Guild points out that evidence was presented at the trial to the effect that GAF had altered a key document in the proceeding. Finally, Guild asserts that GAF failed to keep the Commission completely informed by not disclosing that the criminal trial would take place prior to consummation of the transfer transactions and that it acted to secure grants of its application so as to avoid Commission examination of the character implications of the criminal proceeding. In general, Guild concludes that the applicants have been engaged in a continuing attempt to escape Commission scrutiny of the alleged criminal wrongdoing by withholding potentially significant information; that, as such, they have breached their duty of candor and of maintaining the accuracy and completeness of their applications; and that the Commission should take official notice of available evidence, even in the absence of a definitive verdict, before finding that the proposed transfers of control are in the public interest.

17. Pursuant to Section 1.65, an application must be amended to reflect additional or corrected information when data previously supplied is no longer substantially accurate or complete. This requirement to amend is triggered by a substantial change as to any matter of decisional significance.[18] The rule is to be read in conjunction with information requested in the subject applications for transfer of control of the corporate licensee. Section II, question 4 of the transferee's portion of the applications asks for specification of any adverse finding or final action against any party to the applications which is related to unlawful conduct, such as a felony or fraud. In subsection (b), applicants are asked whether any proceedings are pending involving matters referenced in subsection (a) and, if so, to provide full disclosure concerning persons

[17] The amendment also indicated that both GAF and Sherwin had pled not guilty to the charges and that they would vigorously defend the case and were confident of complete vindication. It also stated that Heyman and the other officers of Newco and Dorset had informed themselves of the facts relating to the charges and shared GAF's and Sherwin's confidence.

[18] In general, applicants should report any substantial change in circumstances pertaining to basic qualifications... matters affecting service to the public or the nature of proposed operations and factors urged as a basis for a grant. The changes to be reported are those which... may make a difference from the standpoint of the public interest, and those which the Commission should be aware of in order to reach a realistic decision..." *Amendment of Part I*, 45 FCC 1793, 1795 (1964).

and matters involved.[19] We believe that GAF sufficiently apprised the Commission of the nature of the charges against GAF and Sherwin. The amendment revealed that GAF and Sherwin were charged by a federal grand jury with criminal conduct which involved, generally, the manipulation of Union Carbide Corporation's stock for GAF's enrichment. In fact, that was the general thrust of the matter and GAF was not required to volunteer a copy of the indictment or to provide continuing documentation as to testimony being taken in the ongoing trial proceeding. In regard to Heyman's status, if any, as an unindicted co-conspirator, the salient facts are that he was not indicted and has not been formally charged with wrongdoing in this criminal proceeding. The Bureau correctly determined that it is Commission policy to refrain from making licensing decisions based on allegations of relevant non-FCC misconduct even where those allegations have resulted in an indictment or are otherwise in the process of being adjudicated. *Policy Regarding Character Qualifications in Broadcast Licensing* (*"Character I"*), 102 FCC 2d 1179, 1204-5 (1986); *recon. denied,* 1 FCC Rcd 421 (1986); *Character II,* 5 FCC Rcd at 3252. Thus the specific facts and evidence relating to the criminal proceeding were not of decisional significance at that stage of the proceeding. The Commission, of course, can exercise its discretion to request additional and more detailed information relating to pertinent matters where the facts warrant, but such action was not warranted at the time.[20]

18. *Criminal Proceeding: Character Implications.* It is also not appropriate, under the policies set forth in *Character I* and *Character II, supra,* to now consider the criminal proceeding and its relevance to the applicant's qualifications to effectuate the transfer of control. On December 13, 1989, subsequent to the Bureau's decision and the filing of Guild's reconsideration request, a federal court jury in the Southern District of New York convicted GAF and Sherwin of illegally and willfully engaging in acts of fraud and deceit to manipulate upward the price of stock registered on a national securities exchange; devising a scheme to defraud and obtain money and property by means of false and fraudulent pretenses and representations; aiding and abetting a registered broker-dealer to falsify records prescribed by the Securities and Exchange Commission ("SEC") as being necessary and appropriate for the protection of investors; and other matters related to these activities. GAF was fined $250,000 on each count for which it was convicted, for a total fine of $2 million. The court also imposed a special $50 assessment on each count, for a total of $400. Sherwin was sentenced to concurrent six-month prison terms to be followed by concurrent one-year terms of probation. He was also assessed $400.[21]

19. However, on March 18, 1991, the U.S. Court of Appeals, Second Circuit, reversed the convictions and remanded the case to the district court for retrial.[22] To summarize that opinion briefly, the government had set forth in its original bill of particulars that GAF and Sherwin had engaged, among other things, in a series of fraudulent and manipulative stock trades involving Union Carbide stock on October 29 and 30, 1986, and November 6 and 7, 1986. Between the second trial (which ended in a hung jury) and the third trial (which resulted in the convictions of GAF and Sherwin), the government filed an amended bill of particulars which included only the trades of October 29 and 30 in the charged series of transactions. At the trials and on appeal, GAF and Sherwin had contended that evidence indicated that Boyd Jefferies, the founder of Jefferies & Company (a registered broker-dealer), rather than Sherwin, was responsible for the November trades; that the government originally believed, as so noted in its original bill of particulars, that the November trades were linked to the October trades for which GAF and Sherwin were ultimately convicted; that the government deliberately adopted fundamental changes in its version of the facts since its original version had been discredited at the second trial; and that since there was reasonable doubt concerning who was responsible for the November trades, there must be reasonable doubt concerning who was responsible for the October trades, which were the subject of the third and final trial. The appeals court held that the district court was required, but refused, to admit into evidence the original bill of particulars for the jury's comparison; and that the district court was required, but refused, to give an instruction to the jury similar to one requested by the defense concerning its theory of the case. The appeals court thus concluded that these errors precluded GAF and Sherwin from receiving from the jury fair consideration of their defense and constituted reversible error.

20. The reversal of the convictions of GAF and Sherwin nullifies any earlier finding of criminal misconduct on their part. Therefore, we are not faced with an ultimate adjudication of relevant non-FCC misconduct by an appropriate trier of fact.[23] Accordingly, consistent with our policies established in *Character I* and *Character II, supra,* consideration of the alleged misconduct and its effect on the qualifications of the applicants in this proceeding is not warranted.

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[19] As the Commission indicated in *Policy Statement and Order* (*"Character II"*), 5 FCC Rcd 3252, 3253 (1990), application questions pertaining to adjudicated and pending proceedings will be amended on certain broadcast forms to comport with Commission determinations in that proceeding.

[20] In the rare case where non-FCC related misconduct is so egregious as to "shock the conscience," it may be considered without having been adjudicated by a competent trier of fact. *See Id.* 102 FCC 2d at 1205, n.60; 5 FCC Rcd at 3252, n.5.

[21] Sherwin and GAF entered into a Consent Decree in March 1990 with the SEC in settlement of a proposed SEC civil action based on the same charges as set forth above. GAF agreed to pay $1.25 million plus interest by way of disgorgement.

[22] *U.S. v. GAF Corporation, et. al,* Case Nos. 444 & 445, slip op. (2nd Cir. March 18, 1991). Further, as we have noted, on June 3, 1991, the court denied a petition for rehearing of its decision. Subsequently, the U.S. Attorney's office announced that it would not seek a new trial. A court order dismissing the indictment and terminating the proceeding against GAF and Sherwin was signed on August 9, 1991.

[23] In *Character I,* 102 FCC 2d at 1196-98, we stated that in determining the character qualifications of an applicant/licensee, convictions for crimes involving fraud and dishonesty would be indicative of an applicant's/ licensee's propensity to deal truthfully with the Commission and would be considered relevant non-FCC misconduct. *Character II* broadened the scope of criminal convictions that we would consider relevant, stating that "a propensity to comply with the law generally is relevant... and that an applicant's or licensee's willingness to violate other laws, in particular, to commit felonies, also bears on our confidence that an applicant or licensee will conform to FCC rules and policies." 5 FCC Rcd at 3252.

21. Guild has consistently maintained that we take note of the different standards, burdens of proof, and procedures that apply in criminal trials and in Commission proceedings and that, even in the absence of adjudicated findings, the Commission is not foreclosed from undertaking an independent inquiry into the facts, circumstances and evidence pertinent to the alleged stock manipulation scheme under the public interest standard. We recognize, as stated in *Character II,* that we are "free to exercise... discretion in situations that arise." 5 FCC Rcd at 3252, citing *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Co.,* 589 F.2d 658, 666 (D.C. Cir. 1978). However, we do not believe that the present situation warrants a departure from our stated policies pertaining to character qualifications. First, the alleged misconduct is not of such nature as to be so egregious as to "shock the conscience." Second, the matters involved in the stock manipulation case constitute highly technical areas of the law in which this Commission lacks expertise. In the absence of an ultimate conviction for unlawful criminal conduct, we believe it would be inappropriate for us to attempt to assess and resolve questions of federal law, and testimony and evidence presented in regard thereto, which are outside our principal area of jurisdiction. It is more appropriate for us to allow such matters to be considered and resolved in the proper forum and for us to focus on, and take notice of, adjudicated misconduct.[24]

22. *Bureau letter of inquiry of December 19, 1990.* Subsequent to the convictions of GAF and Sherwin, but prior to the reversal, the Mass Media Bureau sent a letter inquiring into two specific areas to GAF Broadcasting "to further assist the Commission in its disposition of this case." The first area dealt with the manner in which WNCN was operated on a day-to-day basis and the involvement of Sherwin and other principals in the broadcast operations. The purpose of this aspect of the inquiry was to assess the relationship between the convicted corporate parent and its broadcast subsidiary. *Character I* provides that if a close ongoing relationship between the parent and the subsidiary can be found, if the two have common principals, and if the common principals are actively involved in the day-to-day operations of the broadcast subsidiary, we will then consider the significance of the relationship of the non-FCC misconduct to the operation of the broadcast subsidiary. 102 FCC 2d at 1219. Obviously, the absence of an adjudicated finding of misconduct moots this inquiry.

23. The second area of inquiry concerned three civil cases, two of which involved adjudicated findings of fraud against GAF with respect to the marketing of roofing materials.[25] GAF Broadcasting was requested to provide more specific information concerning these cases in order for the Commission to assess whether these cases, when viewed together with the convictions for stock manipulation, demonstrated a corporate proclivity for wrongdoing.[26] With the reversal of the convictions of GAF and Sherwin, we do not believe the civil fraud cases are of such significance as to form an independent basis for further inquiry. The civil cases were defective product cases which involved leaking roofs which had been installed by independent contractors approximately twenty years ago. GAF stopped manufacturing the roofing materials involved almost ten years ago. There were only three product liability cases of this nature, all of which involved the same product. GAF points out that the cases involved only the GAF Building Materials Division, that senior officers of GAF were not involved and that the cases had nothing to do with GAF Broadcasting. Also, GAF, which manufactures numerous and diverse products, has not been the subject of like cases involving any of its other products. Three limited and related civil cases occuring over the fifteen-year period in which GAF (and GAF II) has controlled WNCN do not by themselves rise to the level of a character qualification concern. Further, the question of whether GAF's response was sufficiently detailed, informative and documented so as to permit the assessment without a hearing of the relationship of these cases to the criminal convictions is a moot matter.

24. *Other Matters.* Guild argues that both the then pending criminal proceeding involving GAF and Sherwin, and the applicants' lack of present financial ability to consummate, rendered the Bureau's approval of the transaction premature and, thus, inappropriate. Guild's objection in this regard is ill-founded. The applications were duly considered and ruled on in the normal course. As set forth in the Bureau's grant letter, the determination of the relevant issues was not premature. The Bureau clearly indicated that the issues before it were whether the proposed transferees possessed the requisite character qualifications to be a Commission broadcast licensee and whether the proposed transfer of control would be in the public interest. The Bureau's determination on those issues was clearly articulated, and favorable and timely action was taken because the applicants were prepared to go forward and the circumstances then attendant, as explained herein, did not warrant deferral of action on the applications.

25. Guild's March 31, 1989, request for stay of the effectiveness of the Bureau's action was filed after the applicants had notified the Commission that the transaction had been consummated. Thus, the fact that consummation had occurred prior to the stay request renders a determination on the request moot. We note, however, that although the parties consummated their transaction on the basis of the Bureau's decision, they did so with full cognizance of the risk that the Commission or the courts might thereafter reverse the Bureau's decision. *See, e.g., Improvement Leasing Co.,* 73 FCC 2d 676, 684 (1979), *aff'd sub nom. Washington Association for Television and Children v. FCC,* 665 F.2d 1264 (D.C. Cir. 1981).

26. In view of the foregoing, IT IS ORDERED, That the petition for reconsideration and supplemental pleadings filed by Listener's Guild, Inc. ARE DENIED.

27. IT IS FURTHER ORDERED, That the request for stay filed by Listener's Guild, Inc. IS DISMISSED as moot.

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[24] *See Character II* (reconsideration), 6 FCC Rcd 3448 (1991).

[25] These cases are set forth in applicants' transfer of control application, BTCH-880322GF, at Exhibit I-4.

[26] Guild did not challenge in its petition for reconsideration the Bureau's determination that these civil business practice cases did not present a character qualification issue. However, in its reply to GAF Broadcasting's response to the Bureau's inquiry letter, Guild maintains that the response is insufficient to assess GAF's conduct in those cases and its relationship to other alleged wrongdoing, including the convictions.

28. IT IS FURTHER ORDERED, That the petition to require filing of early renewal application filed by Class Entertainment and Communications, L.P. IS DISMISSED as moot.[27] [28]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[27] GAF Broadcasting filed WNCN's application for license renewal in the normal course on February 1, 1991. Class had requested prior to the reversal of the criminal convictions that an early renewal procedure be invoked, pursuant to Section 73.3539(c) of the Rules, because it believed the convictions of GAF and Sherwin, and related matters, required a hearing on GAF Broadcasting's qualifications and that the initiation of a revocation hearing would be prejudicial to Class, a prospective competing applicant for the WNCN facilities. Class' contention that a hearing is required was based on essentially the same matters presented to the Commission by Guild. Class offered no independent information based on its own knowledge. We also find no basis for Class's contentions, in its reply to GAF Broadcasting's response to the Bureau's letter of December 19, 1990, that WNCN's response demonstrated a deliberate lack of candor.

[28] Applications for construction permits for new FM stations that are mutually exclusive with WNCN's license renewal application have been filed by Class (BPH-910430ME) and by The Fidelio Group, Inc. (BPH-910502MQ). Petitions to deny WNCN's license renewal application have been filed by Guild, Class and New York branches of the NAACP. Our decision above is dispositive of those matters incorporated in those petitions that have been considered herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Matter of the Applications of

Yankee Microwave, Inc.	File Nos. 26361-CF-R-91
	26365-CF-R-91
For Renewal of the Licenses	26366-CF-R-91
for Point-to-Point Microwave	26368-CF-R-91
Service Stations WLC 405,	26369-CF-R-91
Pittsfield, MA; WLC 406,	26373-CF-R-91
Pittsfield, MA;	26375-CF-R-91
WLC 422, Worcester,	29574-CF-R-91
MA; WHT 315, Paxton, MA;	
WHT 314, Maynard, MA;	
WHT 316, Holyoke, MA;	
WHT 371,Glastonbury, CT;	
WHT 313, Boston, MA	

MEMORANDUM OPINION AND ORDER

Adopted: May 20, 1992; Released: May 28, 1992

By the Chief, Domestic Facilities Division:

INTRODUCTION

1. This Memorandum Opinion and Order concerns a petition to deny eight (8) applications filed by Yankee Microwave, Inc. (Yankee) for renewal of its authorizations to operate point-to-point microwave radio stations between Boston, Massachusetts and New York, New York (referred to by the parties as the "Backbone System"). The petition was filed by ACC Long Distance Corporation (ACC).[1] Responsive pleadings were filed by the parties. For the reasons discussed below, the petition is denied, but a limited renewal period is imposed.

CONTENTIONS OF THE PARTIES

2. ACC, a long distance resale company and former customer of Yankee, filed the above-referenced petition as well as a formal complaint[2] against Yankee under Section 208 of the Communications Act of 1984, 47 U.S.C. § 208.[3] ACC has requested denial of Yankee's renewal applications to the extent the renewals relate to unbuilt frequencies.[4] In addition, ACC requests an evidentiary hearing on the issues of misrepresentation and warehousing spectrum. In its pleadings, ACC generally contends that Yankee has engaged in misrepresentations and exhibited a lack of candor in pursuing authorizations to construct and operate its proposed Backbone System. ACC contends that Yankee violated specific reporting requirements, and misrepresented or concealed material facts by failing to notify the Commission of significant changes in information of decisional significance in its applications and in subsequent requests for extension of time to construct its proposed facilities. ACC claims that misleading statements with respect to customer demand and site availability allowed Yankee to warehouse spectrum for several years.[5]

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[1] Prior to filing this petition, ACC was named as a defendant in a suit filed by Yankee alleging violations of the Racketeer Influenced and Corrupt Organization statute and several state statutes. Following dismissal of the federal action, *Yankee Microwave, Inc.* v. *ACC Corp. et. al.*, No. 90-CA-10296-WD, slip op., (1st Cir. Jan. 8, 1992), Yankee subsequently filed a state law claim against ACC on substantially the same issues. *Yankee Microwave, Inc.* v. *ACC Corp. et. al.*, Civil No. 92-0065 (D. Mass. filed Feb. 5, 1992). The Commission recently denied Yankee's request to hold a formal complaint proceeding filed by ACC, *see* note 2, *infra*, in abeyance pending the outcome of the state court proceeding. *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, DA 92-406 (April 9, 1992).

[2] Specifically, ACC's Complaint alleged fraud and misrepresentation in violation of Sections 1.65(a), 21.13(a)(5), 21.506(a) and 21.710(c) of the Rules, 47 C.F.R. §§ 1.65(A), 21.13(A)(5), 21.506(A), 21.710(C). ACC also alleges violations of Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a). *See Yankee Microwave, Inc.* v. *ACC Corp.*, File No. E-91-94 (filed April 11, 1991). ACC's pleadings in this proceeding incorporated the Complaint by reference.

In response, Yankee maintains that the issues raised by ACC are matters of contract validity and interpretation under Sections 201(b) and 202(a), 47 U.S.C. §§ 201(b) and 201(a), and thus constitute a private dispute not properly raised in this Title III application proceeding. The contentions raised in ACC's pleadings in this proceeding regarding alleged violations of Title II of the Act will be addressed in the pending Section 208 Complaint proceeding.

[3] ACC claims standing as a "private attorney general" under *Office of Communications of United Church of Christ* v. *FCC*, 359 F.2d 994 (D.C. Cir. 1966). Yankee points out that ACC's perceived role as a "private attorney general" does not meet the established test for standing to challenge Yankee's renewal applications, *i.e.*, ACC has not demonstrated that it is a party in interest as required under Section 309(d)(1) of the Communications Act, 47 U.S.C. § 309(d)(1) and Section 21.30 of the Commission's rules, 47 C.F.R. § 21.30. *Lawrence N. Brandt*, 3 FCC Rcd 4082. We need not address this issue, because, for the reasons set forth herein, the petition is denied.

[4] A point-to-point microwave radio station is eligible for renewal if one or more licensed frequency paths emanate from that station. Although Yankee has sought authorizations for 16 stations along the Boston to New York Backbone route, only 8 stations are eligible for renewal. The remaining 8 stations proposed by Yankee along the New York to Boston route connect frequency paths for which no certifications of completion of construction (FCC Form 494A) had been filed at the time for renewal of licenses for point-to-point microwave stations.

[5] ACC's Reply to Opposition to Petition to Deny and additional pleadings direct similar charges against Backbone System applications for which no certifications of completion of construction (Forms 494A) have been filed. Although we will not separately recite each of the latter allegations, we have examined and considered them below in the context of challenges raised against the renewal applications.

3. Yankee asserts generally either that ACC's allegations consist of gross misstatements of the record or that they fail to prove any violations of Commission rules or policy. Yankee maintains that it has been absolutely candid in its dealings with the Commission.[6]

DISCUSSION

4. *Hearing Request* - In order to determine the sufficiency of ACC's *Petition* and its request for an evidentiary hearing, we must consider whether ACC has satisfied the two-step test established in Section 309(d) of the Communications Act of 1934, as amended. As a threshold matter, Section 309(d)(1) provides that a petition to deny must "set forth specific allegations of fact sufficient to show...that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity." 47 U.S.C. § 309(d)(1). If the Commission determines that a *prima facie* case has been made, then, and only then, must the Commission take the second step and determine whether a substantial and material question of fact has been presented. 47 U.S.C. §§ 309(d)(2) and (e). If the Commission finds that no substantial or material question of fact has been presented, no evidentiary hearing need be held. 47 U.S.C. § 309(d)(2). *See, e.g., Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) (*Astroline); Gencom, Inc. v. FCC*, 832 F.2d 171, 180-81 (D.C. Cir. 1987) (*Gencom); Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 394 (D.C. Cir. 1985) (*Jazz).* The Commission must perform the *prima facie* inquiry on the basis of the petition to deny and supporting affidavits alone and on the assumption that the specific facts set forth by the petitioner are true. *Id.*

5. In the conduct of its business, the Commission must rely on the truthfulness of the representations made by the applicants before it. *RKO General, Inc. v. FCC*, 670 F.2d 217, 231 (D.C. Cir. 1981). For that reason, instances of misrepresentation of facts material to those determinations, or lack of candor in presenting such facts to the Commission, are well-established grounds for dismissal or revocation of a license. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1210 (1986), *aff'd on recon.*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, 102 FCC 2d 1179 (D.C. Cir. 1987)(hereinafter *"Character Policy Statement").* Both misrepresentation and a lack of candor could warrant the requested relief of denial of Yankee's renewal applications. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1982). In the instant case, ACC's allegations that Yankee misrepresented material facts of decisional significance to the Commission and that it later concealed material changes in such information, if true, present us with sufficient basis to consider partial denial of Yankee's renewal applications. The Commission has clearly established that spectrum may not be warehoused through numerous requests for extension of time to construct, and that authorizations will not be extended for lack of site availability. *Report and Order*, 102 FCC 2d 5713, 5721-22 (1987) (*"Part 21 Revision"*); *see* 47 C.F.R. § 21.40. Thus, if Yankee has warehoused spectrum in violation of Commission rules and policies as alleged, we may deny, as ACC requests, any applications for renewal of unbuilt frequencies.

6. Having determined as a threshold matter that ACC has made the required *prima facie* showing, we now must determine whether a substantial and material question of fact has been raised with respect to ACC's allegations.[7] In making this determination, we have considered the totality of the evidence presented (*i.e.*, the evidence offered in rebuttal, the applications and other matters the Commission may officially notice, in addition to petitioner's evidence). *Astroline*, 857 F.2d at 1561; *Gencom*, 832 F.2d at 181; *Jazz*, 775 F.2d at 394. Having examined and considered the evidence offered in the pleadings,[8] we conclude that the evidence presented provides a sufficient basis for an informed decision on the merits of ACC's allegations without engaging in a further fact-finding process.

7. *Misrepresentation, Lack of Candor-Cablevision* - The linchpin of ACC's misrepresentation and lack of candor arguments involves Yankee's alleged failures to inform the Commission of significant changes in information provided in its pending applications, as required by Commission rules. *See* 47 C.F.R. §§ 1.65, 21.13. ACC claims that Yankee failed to inform the Commission that its initial customer, Cablevision, withdrew its request for video transmission services during the pendency of Yankee's 1983 applications. ACC has not, however, presented persuasive evidence to establish that Yankee's 1983 applications were still pending at the time Cablevision withdrew its request.[9] ACC's claim, without more, provides an insufficient basis for denial of Yankee's application or further inquiry by this Commission.

8. *Trumbull Gap* - ACC asserts that Yankee concealed information of decisional significance in filing applications for extension of time to construct its so-called "Trumbull Gap" facilities. The Commission has expressly stated that a lack of candor is not implicated in failures to provide information in the absence of Fox River Broadcasting Company, Inc., 93 FCC 2d 127, 129 (1983).[10] ACC bases its claim on Yankee's failure to inform the Commission

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[6] Yankee raises a number of procedural issues. All were considered but are not specifically addressed here because none were relevant to our ultimate disposition.

[7] A "substantial" question for this purpose is a question which "arouses sufficient doubt on the point that further inquiry is called for." *Jazz*, 775 F.2d at 395.

[8] Several months after filing the pleadings authorized under Section 1.45 of our rules, the parties submitted a number of additional pleadings. Section 1.45 contemplates a three-stage pleading cycle. Therefore, the pleadings filed after May 31, 1991 are improper. Nevertheless, we have considered the submissions of all the parties in the interest of obtaining a fuller record upon which to base our ultimate findings.

[9] Section 1.65, 47 C.F.R. § 1.65, requires an applicant to amend a pending application whenever the information provided "is no longer substantially accurate and complete in all significant respects." The section provides further that "an application is 'pending' before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court."

[10] The Commission has stated that lack of candor "involves concealment, evasion, and other failures to be fully informative," while misrepresentation "involves false statements of fact." Both represent deceit. *Fox River Broadcasting*, 93 FCC 2d at 129. The Commission has applied similar standards to common carrier licensees with respect to instances of deliberate misrepresentation and concealment before the Commission. *See Pass Word, Inc.*, 76 FCC 2d 465, 511 (1980), *aff'd* 673 F.2d 1363 (D.C. Circuit 1981), *cert. denied*, 459 U.S. 840 (1982).

that (1) in the fall of 1985 Yankee learned that zoning clearance was "unlikely" for one of its proposed sites, and (2) by early 1987, Yankee had leased microwave and fiber optic frequencies along the route to New York, obviating the need for its Trumbull Gap applications. The presumption that local zoning approval will be granted may be rebutted upon a "reasonable showing" that such approval cannot be obtained. *Heritage Broadcasting of North Carolina*, 1 FCC Rcd 1012, 1014. ACC has not presented evidence showing that local zoning approval has in fact been denied for Yankee's proposed site. In addition, Yankee informed the Commission in statements attached to its extensions requests that it was studying options for extending and rerouting the existing Backbone System.

9. With respect to Yankee's leasing of frequencies to complete the Backbone System, Yankee has presented credible reasons for its continued desire to construct its own microwave route at Trumbull Gap. Given the information made available to the Commission in its filings, we find no support for ACC's claim that Yankee intended to conceal any lack of site availability at Trumbull Gap from the Commission. ACC's litany of "inconsistencies" and "misrepresentations" appears to be no more than speculation alleging Yankee's intent to deceive the Commission with respect to facts pertinent to its Trumbull Gap applications. These speculations do not persuade us that Yankee intended to deceive the Commission in the prosecution of its Trumbull Gap applications.

10. *Springfield* - ACC alleges that in prosecuting its 1985 applications for Springfield, Massachusetts, Yankee (1) failed to report that its initial customer, Petricca Communications, withdrew its request for service during the pendency of Yankee's applications, and (2) later misrepresented in its Springfield extension requests that the customer requesting service had "not yet placed a definitive order for service," when in fact Petricca had withdrawn its request and Yankee had abandoned its planned route to Springfield.[11]

11. Evidence in the record supports ACC's contention that prior to grant of the Springfield applications in 1985, Petricca had indicated definitively that it would not require service to Springfield. Yankee claims to have continued negotiations for Springfield service with other potential customers after Petricca's withdrawal. Yankee, however, has made no showing of any further orders for such service. Yankee's failure to notify the Commission of the lack of customer demand either during the pendency of its 1985 applications or in subsequent extension requests was, in these particular circumstances, a violation of 47 C.F.R. § 1.65. Moreover, statements later filed by Yankee regarding its customer's failure to place a definitive order for service should have given the Commission a more accurate and complete account of customer demand, particularly since the record shows that Petricca closed its business operations in February, 1987. We do not, however, find these violations sufficient to establish that Yankee intended to deceive the Commission with respect to its Springfield applications.

12. *Warehousing* - ACC emphasizes throughout the pleadings that Yankee has warehoused spectrum through its repeated requests for extensions of time to construct its proposed Backbone System facilities, including the Trumbull Gap facilities and those specifically requested in 1985 by Petricca.[12] The extension requests clearly indicate, and Yankee has not denied, that it failed to locate transmitter sites for its Trumbull Gap facilities and failed to attract customers for the bulk of its digital microwave network. Yankee could not have reasonably anticipated the imminent use of its authorized, but unused, frequencies over the entire period cited. Yankee's requests for extensions of time were, in some instances, filed at six month intervals over four years. Nevertheless, the facts in this record do not present us with sufficient evidence to conclude that Yankee intended to deceive the Commission in its appraisal of customer demand or eventual site availability.

13. Having weighed and considered all of the evidence and allegations presented in the pleadings and the record in this case, we find that Yankee did not engage in substantial or material misrepresentations or exhibit a lack of candor in pursuing authorizations to construct and operate its Backbone System and related applications that amounted to deceit and warranted denial of its renewal applications. Nor can we conclude on this record that Yankee violated the Commission's rules in any instances other than those cited above. In light of these findings, we will deny ACC's petition against Yankee's renewal applications.

CONCLUSION

14. In light of the foregoing, although we are denying the petition against Yankee's renewal applications, those applications will be granted for a shorter renewal period than ordinarily prescribed under our rules. A shorter renewal period, for a term of three years, is warranted in light of Yankee's violations of Sections 1.65 and 21.13, 47 C.F.R. §§ 1.65 and 21.13, and in view of its past failures to be completely forthcoming with respect to its public interest showings and to surrender within a reasonable time frequencies for which it has no existing customer demand. *Character Policy Statement* at 1228 (Commission may impose a range of sanctions short of failure to renew a license). Such action is without prejudice to whatever action the Commission may deem appropriate as the result of the pending formal complaint proceeding (File No. E-91-94). Moreover, in accordance with our rules and policies against the warehousing of spectrum, we will grant Yankee's above-referenced renewal applications only to the extent that Yankee has certified completion of construction of its proposed facilities. Accordingly, pursuant to Sections 21.40 and 21.44 of our rules, any outstanding

[11] ACC also claims that Yankee concealed the existence of its Springfield customer in its 1985 applications by failing to include its Service Agreement with Petricca Communications as a showing of its "order for service". However, Petricca was named in the lead application filed in 1985 with other applications for frequencies requested to serve Petricca at Springfield and at other sites. Moreover, the record indicates that this set of applications was granted based on Petricca's request for service. Under these circumstances, we find no merit in ACC's claims that Yankee acted to conceal Petricca's identity from the Commission.

[12] Yankee obtained conditional licenses for a number of frequency paths along the Boston to New York route for which facilities had not been constructed as of the deadline for renewal of licenses for point-to-point microwave radio stations. *See* note 5, *supra*.

requests for extensions of time to construct facilities related to Yankee's Boston to New York Backbone System[13] are denied.

15. *Ordering Clauses.* Accordingly, IT IS ORDERED that the petition filed by ACC Long Distance Corporation to deny the renewal applications of Yankee Microwave, Inc. IS DENIED.

16. IT IS FURTHER ORDERED that the above-referenced renewal applications are GRANTED for a license term of three years, effective the date of release of this order.[14]

17. This order is issued pursuant to Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, and is effective on its release date. Petitions for reconsideration pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, or applications for review pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. § 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* Section 1.4(b)(2) of the Commission's Rules, 47 C.F.R. § 1.4(b)(2).

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

[13] The Boston to New York network includes proposals for frequency paths emanating from the following stations: Stations WHT 313, Boston, Massachusetts; WHT 314, Maynard, Massachusetts; WHT 315, Paxton, Massachusetts; WLC 422, Worcester, Massachusetts; WHT 316, Mt. Tom, Massachusetts; WLC 405, Pittsfield, Massachusetts; WLC 406, Washington Mountain, Massachusetts; WLC 407, Springfield, Massachusetts; WHT 317, Glastonbury, Connecticut; WHT 318, Meriden, Connecticut; WHT 319, Trumbull, Connecticut; WHT 320, Norwalk, Connecticut; WLB 972, Bristol, Connecticut; WLB 973, Armonk, New York; and WLB 974, White Plains, New York.

[14] Due to an inadvertent processing error, Yankee's renewal application for the Boston (WHT 313), Massachusetts facility was placed on a Public Notice listing applications granted on May 15, 1991. Having weighed and considered the issues raised in the reconsideration petition, and in light of our action in this case, ACC's Petition for Reconsideration is hereby dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-429

In re Applications of

EUGENE WALTON	File No. BPH-870904MS
HENDERSON BROADCASTING OF MEMPHIS, INC.	File No. BPH-870908MJ
DAVID J. BOTT AND CARESE C. BOTT, JOINT TENANTS	File No. BPH-870908MN
PEDERSON COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870908MS
OMNI BROADCASTING CORP.	File No. BPH-870908MV
GERMANTOWN BROADCASTING CORP.	File No. BPH-870908MY

For Construction Permit for a
New FM Station on Channel 298A
at Germantown, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 28, 1992

By the Commission:

1. By this action we affirm a Review Board Decision, *Eugene Walton*, 6 FCC Rcd 6071 (Rev. Bd. 1991), granting Omni Broadcasting Corporation's (Omni) application for a new FM Station at Germantown, Tennessee. Now before the Commission are Applications for Review filed by each of the parties.[1] We will grant Bott's Application for Review to the limited extent indicated herein. Further comment is also warranted with respect to Pederson's and Heart's Applications for Review. In all other respects the applications for review will be denied.

2. *Bott's Integration*: Bott filed applications for construction permits for new FM facilities at both Germantown and Mt. Juliet, Tennessee. Both applications were financed in part by Mrs. Bott's father. Mrs. Bott promised her father that she and Mr. Bott would be active in the management of both stations. The Botts claimed credit for 100 percent integration in this proceeding. They did not propose integration at the Mt. Juliet station and testified that they could fulfill their obligations at the Mt. Juliet facility on a secondary basis by visits on weekends and by telephone. The ALJ and the Board gave Botts no integration credit, finding that the Botts had not shown how they could be fully integrated into the Germantown station and still honor their commitment to Mrs. Bott's father to be active at the Mt. Juliet facility.[2]

3. After reviewing the record with respect to this matter, we have concluded that the rulings below were in error and that it would be helpful to give guidance to subordinate authorities concerning the showing required to demonstrate that an integration proposal is reliable. The Botts never pledged to be integrated into the management of the Mt. Juliet station. There is no evidence that they ever intended to be involved in day-to-day on-site supervision of the facility. They testified during the 1989 hearing sessions that they intended to hire a manager and staff to operate the Mt. Juliet station and that they expected to provide the necessary oversight on weekends and by telephone. Tr. 1666-67, 1791-92. The actual construction of the facility would be supervised by the station's engineer. Tr. 1668.

4. The rulings below were based on Mrs. Bott's admission that she had promised her father that they would be "involved" in the management of the Mt. Juliet station. Tr. 1681. There is nothing in the record to suggest that this involvement contemplated the Botts' spending time in Mt. Juliet during the week or that they would be involved in activities otherwise detracting from their full-time integration at the Germantown facility. The fact that the Botts never intended to be integrated into the management of the Mt. Juliet station, and their testimony (see para. 3 *supra)* concerning their proposed role at the facility are not only consistent with their integration proposal here, but are also facially sufficient to satisfy the promise they said they made to Mrs. Bott's father that they would be "involved" in the management of the Mt. Juliet station.[3] Accordingly, we find no reason to conclude that the Bott's promised "involvement" in the Mt. Juliet station is inconsistent with the integration commitment for the Germantown station. We thus conclude that Bott has reliably shown that it will be able to carry out its integration proposal.[4]

5. *Pederson's Integration*: Pederson is a limited partnership. The general partner, Paula M. Pederson, has a 20 percent equity interest. The limited partner, B. Scott Reardon III, has an 80 percent equity interest. The Board attributed Reardon's 80 percent interest to Pederson for integration purposes, finding that Reardon was the driving force behind the application and that the partnership agreement failed to insulate Reardon from involvement in the applicant. The Board rejected an amendment to the limited partnership agreement proposing to provide the required insulation as an impermissible upgrading of Pederson's comparative qualifications. 6 FCC Rcd at 6076-77 ¶¶ 26-29. Pederson asserts that the Board's decision is in error. Specifically, it argues that it is a bona fide limited partnership and that the Board should have accepted its curative amendment. It asserts that Mrs. Pederson, its general partner, has made a pro rata capital contribution to the applicant, has acted independently of Reardon and has been the moving force in the applicant. It thus concludes that Mrs. Pederson will control the partnership. It also argues that there is good cause for the curative amendment because Reardon's rights under the original agreement "are not so extraordinary as to suggest that the limited partnership agreement was a sham or that it deprived the general partners of their exclusive control

over the applicant." *Evergreen Broadcasting Company*, 6 FCC Rcd 5599, 5960 ¶ 8 (1991), citing *Doylan Forney*, 5 FCC Rcd 5423, 5425 ¶ 15 (1990).

6. Pederson's reliance on *Evergreen* is misplaced. In *Forney* we held that an applicant must show good cause for acceptance of a post-cut-off curative amendment as required by 47 C.F.R. § 73.3522(b) and *Erwin O'Conner*, 22 FCC 2d 140, 143 (Rev. Bd. 1970). 5 FCC Rcd at 5425 ¶ 13. Pederson has made no such showing. Instead, Pederson waited until after these applications were designated for hearing to attempt to amend to provide the necessary insulation. Pederson made no effort to show why a timely curative amendment could not have been filed earlier. Thus, the amendment was properly rejected by the Board as a post cut-off upgrading of Pederson's comparative qualifications. *See Forney*, 5 FCC Rcd at 5425 ¶ 16.

7. Turning to the limited partnership agreement, as filed, we find that the agreement was fatally flawed from the time of its execution, because it did not prohibit Reardon from communicating with Pederson about the day-to-day business of the partnership and it authorized Reardon to make a determination concerning Pederson's competence and to replace her as general partner, instead of placing the responsibility for such a determination with a court of competent jurisdiction. Pederson Ex. 6, ¶ 17. Thus, Reardon's right to remove Mrs. Pederson as general partner was inconsistent with his alleged limited partnership interest. *Ownership Attribution*, 58 RR 2d 604, 619-20 ¶¶ 48-49 (1985). Without considering questions concerning the role of Reardon in the filing of the application, the failure of Pederson's limited partnership agreement to insulate Reardon from involvement in the applicant is sufficient to warrant the attribution of Reardon's 80 percent equity interest for integration purposes and Pederson is entitled to credit for the integration of only Mrs. Pederson's 20 percent equity interest. *Evergreen Broadcasting Company*, 6 FCC Rcd *supra* at 5600 ¶ 9; *Cotton Broadcasting*, 4 FCC Rcd 1781, 1783 ¶¶ 20-21(1989).

8. *Heart's Application*: Heart's application was dismissed by the Mass Media Bureau prior to the designation of this proceeding for hearing. Its petition for reconsideration was denied in the *Hearing Designation Order*, 3 FCC Rcd 5591 (MMB 1988). Heart then filed a request to have the ALJ certify a question concerning the dismissal of its application to the Commission. The ALJ dismissed Heart's petition because it was not a party to the proceeding. The ALJ held that he lacked authority to act on any matters relating to Heart's application. *Eugene Walton*, FCC 89M-1971 (July 27, 1989). Heart now argues that its application was dismissed improperly by the Bureau; that all of the subsequent actions in this proceeding constitute prejudicial error because none of those determinations, including the ALJ's order dismissing its certification request, was served on Heart or its counsel; and that it was thus deprived of its right to participate in the hearing.[5]

9. The ALJ correctly concluded that he had no authority to consider the request for certification. Thus, his dismissal of Heart's request was appropriate. An ALJ's authority is limited to matters that could be raised by the parties in Commission proceedings pending before him. 47 C.F.R. §0.341. Heart was not a party to the proceeding designated for hearing. The appropriate procedure for Heart to challenge the Bureau's order dismissing its application would have been to file an application for review pursuant to 47 C.F.R. § 1.115(a). The Bureau, in a pleading filed October 7, 1988 and served on Heart, put Heart on specific notice of the procedural deficiencies in the request for certification before the period for filing applications for review under Section 1.115 had expired. In view of Heart's failure to request timely review of the Hearing Designation Order, the Order dismissing Heart's application had become final and it has no right to further participation in this proceeding. *See Hughes-Moore Associates, Inc.*, 7 FCC Rcd 1454, 1455 ¶ 12 (1992). Under these circumstances, Heart was not prejudiced by the failure to serve it with the rulings issued in this proceeding, and its instant application for review will be dismissed without further consideration.[6]

10. *Comparative Evaluation*: Only three applicants, Omni, Bott and GBC, have been given credit for 100 per cent integration, warranting decisive quantitative preferences over the other applicants. The qualitative comparative attributes of those three applicants are as follows:[7]

	Omni	GBC	Bott
Local Residence[8]	100% Long term	100% Future	100% Shorter term
Civic Involvement	None	None	100% Slight credit[9]
Broadcast Experience[10]	100%	100%	100%

Omni and Bott are preferred over GBC because their past local residence is entitled to greater weight than GBC's mere promise that its principals will move to Germantown if their application is granted. GBC has no offsetting qualitative advantage.

11. In evaluating Omni's and Bott's comparative proposals, we will treat the applicants' local residence and civic activities as a unified comparative factor. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2297 ¶¶ 7-11 (1991), recon. dismissed, 7 FCC Rcd 674 (1992); *Ronald Sorenson*, 6 FCC Rcd 1952, 1952-53 ¶ 5 (1991), recon. denied 6 FCC Rcd 6901 (1991), appeals filed Nos. 91-1208, 91-1213 (D.C. Cir. May 8, 1991). Based on our review, Omni is the preferred applicant. Omni's principal, Wilbourn, has lived continuously within the proposed service area since 1968 and its other principal, Phillips, since 1957. In contrast, Mr. Bott moved into the service area, and Mrs. Bott returned to the service area less than one year before filing the application. Credit for Mrs. Bott's earlier residence is significantly discounted because of the hiatus between it and her return to the area as an adult. *Colonial Communications*, 7 FCC Rcd *supra* at 674 ¶ 6. Thus, Omni has the edge for local residence.

12. Turning to civic participation, the Botts' showing of civic activities that commenced prior to the filing of their application was modest in nature. While those activities continued after the filing of the application and other activities commenced after the filing of the application, these aspects of Bott's showing are entitled to only minor enhancement credit. *Beach Broadcasting Limited Partnership*, 6 FCC Rcd 4485 (1991); *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶¶ 18-19 (Rev. Bd. 1989), rev. denied 5 FCC Rcd 3712 (1990). Thus, we conclude that Omni's longer continuous local residence, even without significant civic participation, outweighs the credit awarded Bott for its shorter local residence and the slight credit awarded for civic activities.[11] Omni's advantage for local residence and its slight advantage for broadcast experience fully support the grant of Omni's application.

13. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed November 26, 1991 by the Mass Media Bureau IS GRANTED; and that the Application for Review filed November 21, 1991 by Heart of America Broadcasting, Ltd. IS DISMISSED.

14. IT IS FURTHER ORDERED, That the Request for Official Notice filed February 21, 1992 by Eugene Walton IS DISMISSED as moot.

15. IT IS FURTHER ORDERED, That the Applications for Review filed November 27, 1991 by David J. Bott and Carese C. Bott, Joint Tenants, and November 29, 1991 by Pederson Communications Limited Partnership ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED.

16. IT IS FURTHER ORDERED, That the Applications for Review filed November 27, 1991 by Eugene Walton and Henderson Broadcasting of Memphis, Inc., and November 29, 1991 by Germantown Broadcasting Corporation ARE DENIED; and that the Application for Review filed November 27, 1991 by Omni Broadcasting Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Applications for Review were filed on November 21, 1991 by Heart of America Broadcasting, Ltd. (Heart), on November 27, 1991 by Eugene Walton (Walton), David J. Bott and Carese C. Bott (Bott), Henderson Broadcasting of Memphis, Inc., (Henderson), and Omni, and on November 29, 1991 by Pederson Communications Limited Partnership (Pederson) and Germantown Broadcasting Corporation (GBC). Oppositions were filed on December 16, 1991 by Walton, Henderson, Pederson, Omni, GBC and the Mass Media Bureau. On November 26, 1991 the Mass Media Bureau filed Motion to Dismiss Heart's Application for Review. Heart filed an Opposition on December 5, 1991 and Omni filed Comments in Support of the Motion to Dismiss on December 16, 1991. On February 21, 1991, Walton also filed a Request for Official Notice with respect to the decision in *Jerome Thomas Lamprecht v. FCC*, No. 88-1395 (February 19, 1992).

[2] On June 10, 1991 the Botts filed a motion to dismiss their Mt. Juliet application. That application has been dismissed. FCC 91M-1975 (ALJ June 21, 1991). Although that action does not moot the question concerning Bott's integration proposal in this case, for the reasons set forth below, we resolve that question in Bott's favor.

[3] In light of the evidence concerning the Botts' intention to supervise the Mt. Juliet facility by visits on weekends and by telephone, we believe that they set forth in sufficient detail their proposal to allocate their time between the two stations. Thus, the cases relied on by the Board to discredit their integration proposals, where applicants failed to make the requisite showing, are distinguishable.

[4] In this regard, we note that the ALJ also concluded that Mrs. Bott's role at the proposed Germantown station was not entitled to credit for integration of ownership and management. 6 FCC Rcd at 1216 ¶ 67. In light of the ultimate resolution of this proceeding reflected below, we see no need to address the arguments raised by Bott concerning that determination at this time.

[5] When the dismissal of Heart's application was sustained in the Hearing Designation Order, Heart was deleted from the service list maintained by the Commission's Docket Division. The filing of the request for certification with the ALJ, a procedure generally reserved for parties to the proceeding, failed to put the Docket staff on notice that it would have to check the service list to make sure that Heart was still on it. Thus, the failure to serve Heart with the ALJ's order dismissing the certification request was the result of an administrative oversight. However, that oversight was of no consequence because the ALJ's order dismissing the certification request was not appealable under 47 C.F.R. § 1.115(e)(3). The failure to serve Heart with subsequent rulings is not relevant because Heart was not a party to the proceeding and it was not entitled to be served with those rulings.

[6] Heart's argument that the ALJ should have granted its request for certification to the Commission is without merit. There is no reason to require ALJs to review and make determinations with respect to the merits of unauthorized pleadings filed by non-parties to hearing proceedings.

[7] In accordance with the decision in *Jerome Thomas Lamprecht v. FCC*, No. 88-3995 (D.C. Cir. Feb. 19, 1995), we will not grant enhancement credit for female ownership to any applicant in this proceeding. Under these circumstances, Walton's Request for Official Notice concerning this question may be dismissed as moot.

[8] Omni's principals, Phillips and Wilbourn, have lived within the proposed service area continuously since 1957 and 1968, respectively. Phillips also owns a vacation home in Eastport, Mississippi. As found by the ALJ, the vacation home does not raise a question with respect to the genuineness of Omni's integration proposal. 6 FCC Rcd at 1302 ¶ 124. In contrast, Mr. Bott moved into the service area in December 1986, less than one year before the filing of Bott's application. Mrs. Bott lived in the Germantown area as a child from 1964 through 1980. She returned to the area in December 1986 with Mr. Bott. The credit for Mrs. Bott's childhood residence is discounted because of the hiatus between it and her more recent residence as an adult. *Colonial Communications, Inc.*, 7 FCC Rcd 674 (1992).

[9] Bott is entitled to only minor credit for civic activities initiated after the application was filed. *The Baltimore Radio Show, Inc.*, 4 FCC Rcd 6437, 6441 ¶ 19 (Rev. Bd. 1990). Bott filed its application in September, 1987. Although Mr. Bott did not give specific dates for his involvement in civic activities, he has been affiliated with Memphians for Life, the Tennessee Home Education Association, the First Evangelical Church, and the Germantown Chamber of Commerce since 1987. Mrs. Bott has been a member of F.L.A.R.E. (a group concerned with public morality), a Board Member of Memphians for Life, a member of the Daughters of the American Revolution, and a docent for the Mallory-Neely House in Memphis since early 1987. Thus, Bott has a modest record of pre-filing civic activities, which together with its record of post-filing activities (6 FCC Rcd at 1295 ¶¶ 57 and 60) are entitled to only minor qualitative enhancement credit.

[10] Omni, GBC and Bott are each entitled to enhancement credit for 100% broadcast experience. The Botts have been involved in broadcasting only since 1986. GBC's principals, A. J. Hendrickson and William E. Taylor, have been involved in broadcasting since 1951 and 1959, respectively. Omni's principals, Wilbourn and Phillips, have been involved in broadcasting since 1965 and 1973, respectively. Thus, Omni and GBC are entitled to an advantage over Bott, because their principals have longer and

more diversified broadcast experience than Bott. Under the circumstances of this proceeding the differences in Omni's and GBC's principals long term broadcast experience are not decisionally significant. *See* 6 FCC Rcd at 6078 ¶ 35.

[11] Compare *Ronald Sorenson*, 6 FCC Rcd *supra* at 1953 ¶¶ 7-11, where the winning applicant's long term residence with an impressive record of civic activities was found sufficient to outweigh the longer residence of a mutually exclusive applicant. Here the Botts have neither the long term residence nor the outstanding record of civic activities attributed to the winning applicant in *Sorenson*.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Smoothline, Ltd. NAL/Acct. No. : 215HF0010
Hong Kong

NOTICE OF APPARENT LIABILITY

Adopted: May 21, 1992; Released: May 28, 1992

By the Chief, Enforcement Division, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Smoothline, Ltd. for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Sections 15.233(c) and 2.931 of the Commission's Rules, 47 C.F.R. §§ 15.233(c) & 2.931. This action results from violations of Commission rules relating to marketing of radio frequency devices requiring equipment authorization.

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND

3. On July 31, 1991, the Sampling and Measurements Branch of the Office of Engineering and Technology (OET) purchased a cordless telephone manufactured by Smoothline from a department store in Columbia, Maryland. Smoothline holds an equipment authorization for the device: FCC ID: C5Q9120. Measurements were made which indicated that the device operated on 46.7 MHz with afield strength of 50,119 μV/m at a distance of 3 meters. The maximum field strength permitted by Section 15.233(c) of theRules is 10,000 μV/m at 3m.

4. Section 302(b) of the Communications Act provides that "No person shall manufacture, import, sell, offer for sale, or ship devices or home electronic entertainment equipment and systems, or use devices which fail to comply with regulations promulgated pursuant to this section." Section 2.931 provides in pertinent part that "In accepting a grant of an equipment authorization the grantee warrants that each unit of equipment marketed under such grant and bearing the identification specified in the grant will conform to the unit that was measured and that the data...filed with the application for type acceptance or certification...continues to be representative of the equipment being produced under such grant within the variation that can be expected due to quantity production and testing on a statistical basis."

5. Cordless telephones are intentional radiators under Part 15, Subpart C requiring certification under Part 2, Subpart J.

6. On March 3, 1988, the Commission issued a Notice of Apparent Liability for Monetary forfeiture for $2,000 to Sejin Acoustics Co., Ltd., the previous name of Smoothline, for marketing cordless telephones which did not conform to their equipment authorization. The forfeiture was paid in full on March 24, 1988.

III. DISCUSSION

7. Smoothline, Ltd. has violated Section 302(b) of the Communications Act by marketing a cordless telephone which does not conform to their equipment authorization and could not be certified because it does not meet the technical specifications for such devices.

8. The violation is willful.

9. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures,* 6 FCC Rcd. 4695 (1991), *recon. pending,* the base forfeiture amount would be $7,000. Because of the history of violation and the fact that the violation in this case, where the emitted field strength was five times that authorized, is egregious, it is consistent with the *Policy Statement* that the forfeiture amount be increased to $10,000. No other adjustments appear warranted.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Smoothline, Ltd., IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for marketing equipment in violation of Section 302(b) of the Communications Act and Sections 2.931 and 15.233(c) of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Smoothline, Ltd., shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: NAL/Acct. No. 215HF0010
Room 744
1919 M Street, NW
Washington, D.C. 20554

12. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent, by certified mail, to Smoothline, Ltd., 8F Luen Tai Industrial Building, 72-76 Kwai Cheong Road, Kwai Chung NT Hong Kong.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-99

In the Matter of

Amendment of Section 73.202(b), RM-6640
Table of Allotments,
FM Broadcast Stations.
(North Crossett, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 18, 1992; Released: May 28, 1992

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 3745 (1989), issued in response to a petition filed by Contemporary Communications ("Contemporary") proposing the substitution of Channel 274C2 for Channel 274A at North Crossett, Arkansas, and modification of the permit for Station KWLT(FM)[1] to specify operation on the higher powered channel.[2] Contemporary filed supporting comments. No other comments were received.

2. We believe the public interest would be served by substituting Channel 274C2 for Channel 274A at North Crossett since it would provide the community with an expanded coverage FM service. Therefore, pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will modify herein the permit for Station KWLT(FM) to specify operation on Channel 274C2 at North Crossett, Arkansas, as requested.

3. As stated in the *Notice*, Channel 274C2 can be allotted to North Crossett consistent with the minimum distance separation requirements of the Commission's Rules, provided the transmitter is located at least 12.4 kilometers (7.7 miles) west of the community[3] to avoid a short spacing to Channel 273A, Gould, Arkansas,[4] as well as to Station WMSI(FM), Channel 275C, Jackson, Mississippi.[5] [6]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
North Crossett, Arkansas	274C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit held by South Arkansas Broadcasting, Inc. for Station KWLT(FM) (BPH-870313MD), IS MODIFIED to specify operation on Channel 274C2[7] in lieu of Channel 274A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

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[1] After the close of the record in this proceeding, South Arkansas Broadcasting, Inc. ("South Arkansas"), became the successor in interest to Contemporary. A voluntary assignment of the construction permit from Contemporary to South Arkansas was granted October 12, 1990 (File No. BAPH-900927HZ) and consummated November 30, 1990. We will serve South Arkansas with a copy of this *Report and Order*.

[2] Contemporary also requested the substitution of an alternate channel for Channel 277A at Bastrop, Louisiana, to accommodate its proposal. We recently substituted Channel 247A for Channel 277A at Bastrop in the context of MM Docket No. 89-85 to accommodate a proposal to modify the facilities of Station KAYZ(FM), Channel 276A, El Dorado, Arkansas, to specify operation on Channel 277C1. *See Report and Order* (MM Docket No. 89-85), 7 FCC Rcd _____ (adopted May 13, 1992).

[3] Coordinates used for Channel 274C2 are 33-08-23 and 92-04-14.

[4] Coordinates for Channel 273A at Gould are 33-59-00 and 91-33-26.

[5] Coordinates at the licensed site of Station WMSI(FM) are 32-12-46 and 90-22-54.

[6] Since the proposal to allot Channel 274C2 to North Crossett was filed prior to October 2, 1989, it has been examined under the minimum distance separation requirements of Section 73.213(c)(1) of the Commission's Rules. Although the North Crossett allotment clears Channel 273A, Gould, Arkansas, at coordinates 33-59-00 and 91-33-26 with a site restriction under those rules, it would be 1.0 kilometers (0.6 miles) short-spaced at the specified site to the Gould allotment under the new spacing requirements of Section 73.207(b)(1). Therefore, the permittee of Station KWLT(FM) may avail itself of the provisions of Section 73.213(c)(1) with respect to the Gould allotment, as well as to a pending application at that community at coordinates 33-59-01 and 91-33-54 (see File No. 901105MW).

[7] Since the modification request for Station KWLT(FM) was filed prior to May 21, 1990, the effective date of the fee collection program implementing the provisions of the *Omnibus Budget Reconciliation Act of 1989* (Gen. Doc. 86-285), 5 FCC Rcd 3558, 3575 (1989), South Arkansas Broadcasting, Inc. is not required to submit a rule making fee when filing its application to implement the upgrade at North Crossett, Arkansas.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the permittee of Station KWLT(FM), as follows: South Arkansas Broadcasting, Inc., P.O. Box 159, Fayetteville, GA 30214.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-120

In the Matter of

Amendment of Section 73.202(b), RM-7968
Table of Allotments,
FM Broadcast Stations.
(Hartford, Vermont)

NOTICE OF PROPOSED RULE MAKING

Adopted: May 15, 1992; Released: May 28, 1992

Comment Date: July 20, 1992
Reply Comment Date: August 4, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Family Broadcasting, Inc. ("petitioner"), permittee of Station WGLV-FM, Channel 282A, Hartford, Vermont, requesting the substitution of Channel 282C3 for Channel 282A at Hartford and modification of Station WGLV-FM's construction permit to specify operation on the higher powered channel. Petitioner states it will apply for channel, if allotted.

2. Although the petitioner's specified site complies with the minimum distance separation requirements of the Commission's Rules, we question whether the proposal would comply with the technical requirements of Section 73.315, which requires that a 70 dBu contour encompass the entire proposed community of license from the transmitter site. A staff engineering analysis reveals that the site specified by the petitioner would require an antenna *height above average terrain* ("HAAT") of 150 meters and an effective radiated power ("ERP") of 11 kW. A conventional Class C3 station, operating at maximum facilities, would use a HAAT of 100 meters and ERP of 25 kW. In this regard, our evaluation of the petitioner's proposal indicates that it could provide a city-grade signal to Hartford. Since the provision of a city-grade signal is an important public interest consideration, petitioner is requested to provide additional information in its comments to establish a *prima facie* showing of its ability to comply with the requirements of Section 73.315 of the Commission's Rules. Failure to provide the requested information could result in a denial of the proposal.

3. We believe the public interest would be served by proposing the substitution of Channel 282C3 for Channel 282A at Hartford, Vermont, since it could provide the community with an expanded coverage area FM service. As requested, we shall tentatively propose to modify petitioner's authorization for Station WGLV-FM to specify operation on Channel 282C3 in lieu of Channel 282A. Channel 282C3 can be allotted to Hartford in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.2 kilometers (7.6 miles) north to accommodate petitioner's desired site.[1] Since Hartford is located within 320 kilometers (200 miles) of the U.S. Canadian border, concurrence of the Canadian government will be requested. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 282C3 at Hartford, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hartford, Vermont	282A	282C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **July 20, 1992,** and reply comments on or before **August 4, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Joseph E. Dunne III, Esq.
May & Dunne
1000 Thomas Jefferson Street, N.W.
Suite 520
Washington, D.C. 20007
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are

[1] The coordinates for Channel 282C3 at Hartford are North Latitude 43-46-08 and West Longitude 72-21-35.

advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-316

In the Matter of

Amendment of Section 73.202(b), RM-7834
Table of Allotments,
FM Broadcast Stations.
(Corrales, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 15, 1992; Released: May 28, 1992

By the Acting Chief, Allocations Branch:

1. At the request of LV Broadcasting Educational Foundation, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 6492 (1991), proposing the substitution of Channel 236C1 for Channel 236A at Corrales, New Mexico, and the modification of Station KSVA's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 236C1 for Channel 236A at Corrales since it could provide the community with a wide coverage area FM service. Channel 236C1 can be allotted to Corrales in compliance with the Commission's minimum distance separation requirements with a site restriction of 24.5 kilometers (15.2 miles) southwest to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify Station KSVA's construction permit to specify operation on Channel 236C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Corrales, New Mexico	236C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of LV Broadcasting Educational Foundation for Station KSVA, Corrales, New Mexico, IS MODIFIED to specify operation on Channel 236C1, in lieu of Channel 236A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, LV Broadcasting Educational Foundation, Inc., permittee of Station KSVA, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 236C1 at Corrales are North Latitude 35-03-55 and West Longitude 106-46-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-251

In the Matter of

Amendment of Section 73.202(b), RM-6826
Table of Allotments,
FM Broadcast Stations.
(Chester, Kingstree, Wedgefield,
and Summerton, South Carolina)

ERRATUM

Released: May 28, 1992

By the Acting Chief, Allocations Branch:

1. By *Report and Order* in this proceeding (DA-92-521, released May 4, 1992), the Commission, *inter alia*, substituted Channel 238A for Channel 257A at Wedgefield, South Carolina, and modified Station WIBZ(FM)'s license to specify the alternate Class A channel. However, in paragraphs 4, 6, and 7, the staff inadvertently referred to the substitute channel as 257A instead of Channel 238A. Therefore, in these paragraphs the substitute channel is hereby changed to Channel 238A. In addition, the amendatory language in paragraph 11 is corrected to read as follows:

IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Raymond F. Reich for Station WIBZ(FM), Wedgefield, South Carolina, IS MODIFIED to specify operation on Channel 238A in lieu of Channel 257A, subject to the following conditions:

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-263

In the Matter of

Amendment of Section 73.202(b), RM-7793
Table of Allotments,
FM Broadcast Stations.
(Los Alamos, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: May 15, 1992; Released: May 28, 1992

By the Acting Chief, Allocations Branch:

1. At the request of Jeffrey Rochlis ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 6 FCC Rcd 5326 (1991), proposing the allotment of Channel 298C to Los Alamos, New Mexico, as the community's third local commercial FM service. Comments expressing a continuing interest in applying for Channel 298C, if allotted, were filed by the petitioner. KBOM Limited Partnership ("KBOM") filed opposing comments. Reply comments were filed by the petitioner.

2. KBOM, licensee of Station KBOM, Channel 294C1, Los Alamos, argues that the allotment is not technically feasible because the transmitter site proposed in the *Notice*, which is 40 miles northeast of Los Alamos, is on land owned by the Bureau of Land Management ("BLM") and adjacent to the Carson National Forest. In this connection, KBOM states that it is the policy of the Forest Service and BLM to require communications facilities to be located at existing communications sites. Even if a transmitter site could be located, KBOM states that a tower 514 meters in height would be required to achieve the Class C facilities of 600 meters height above average terrain. In reviewing a map of the area, it contends that there are no designated or operating communications sites within the permissible transmitter site area and that the terrain within this potential site area is rugged and without roads or power lines. Further, KBOM submits that it would be prohibitively expensive to build a tower of 514 meters. It also questions whether permission would even be granted to erect such a tower on the edge of a national forest because of the visual environmental impact.

3. KBOM questions the validity of petitioner's statement of intent to apply for the channel. It states that this is one of three identical petitions for allotments at different communities filed by the petitioner on the same day.[1] It points out that Rochlis also has on file an application for a new Class A FM station at Thousand Palms, California (BPH-910211MH). Therefore, in order to fulfill his commitment to also apply for the newly requested channels, KBOM claims that Rochlis would have to make a financial commitment of at least $1.6 million. KBOM also argues that if the petitions are granted, Rochlis would have little chance of succeeding in a comparative hearing if competing applications are filed by either a local resident, a minority or a female, even if petitioner proposes 100% integration. Further, the petitioner can propose such integration for only one of the requested allotments. Therefore, KBOM submits that the petitions are based on the supposition that the Commission will adopt petitioner's proposal advanced in Gen. Docket 90-264 to award a "pioneer's preference" in comparative hearings to those parties who initiate the allotment proceeding.[2] Thus, rather than accept the bare statement that petitioner will apply for the channel, KBOM requests that the Commission require the submission of evidence that he has the financial ability to honor the commitment.[3]

4. Petitioner states that Channel 298C is a technically feasible allotment. First, he claims that a tower of only 300 meters, and not 514 meters as alleged by KBOM, at the reference coordinates would provide Los Alamos with the requisite city-grade signal and maintain the channel's status as a Class C facility. Secondly, a review of a United States Geodetic Survey map shows that there are roads near the reference site and there is no reason to believe that power could not be extended to a transmitter should the reference site become the ultimate transmitter site. However, he states that even if he should desire a site other than that represented by the reference coordinates, there is an area of approximately 20-25 square miles in which a tower could be located. In addition, the reference coordinates are not located in the Carson National Forest as alleged by KBOM, but three miles west of the forest. A site an additional three miles west can be specified and still provide Los Alamos with the required signal strength. Finally, petitioner agrees that the proposed reference coordinates are located on BLM land. However, he claims that BLM does allow its land to be used as communication sites. In this regard, however, he states that BLM will not consent in advance to land use, but will consider a request after the Commission has granted a permit. Recognizing this fact, petitioner cites *Alden Communications Corp.*, 64 RR 2d 1612, 1614 (1988) ("a mere willingness by the government agency to entertain a request for use of the land in question is sufficient to provide reasonable assurance of the site's availability").

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[1] Rochlis has also requested allotments for Redmond and Ashland, Oregon. On October 31, 1991, Rochlis withdrew his interest in the Redmond proposal and the proceeding has been terminated. *See Report and Order* released May 13, 1992, DA 92-551. The Ashland request is pending in MM Docket No. 91-265. *See* 6 FCC Rcd 5330 (1991).

[2] *See Reexamination of the Policy Statement on Comparative Broadcast Hearings* (GC Docket No. 92-52), 7 FCC Rcd 2664 (1992).

[3] KBOM also argues against what it characterizes as the Commission's policy of allotting channels on demand, noting the economic harm caused to existing stations such as KBOM from such a policy. However, these arguments are not appropriate for consideration in this proceeding. The Commission abolished its consideration of such *Carroll* doctrine issues, stating that it had determined that additional competition to existing broadcast stations by new full services stations is beneficial to the public. *See* 3 FCC Rcd 638 (1988).

5. Petitioner avers that KBOM's comments concerning his intention to apply for the channel and the underlying rationale for requesting the allotment are unfounded. He states that parties other than women, minorities and local residents file applications for new FM channels, as attested to by petitioner's application for a new station at Thousand Palms, California. In addition, KBOM has not provided any factual basis for claiming that the petitions were submitted in an effort to garner a "pioneer's preference" to applicants who initiate rule makings to allot find a new FM or TV channel. Finally, petitioner reiterates its intention to apply for the channel, if allotted. He states that he is aware of the financial responsibility deriving from these commitments and is prepared to fulfill them. Petitioner contends that KBOM opposes the allotment since it would result in direct competition to its Los Alamos station.

6. We have carefully reviewed the pleadings before us and find that the public interest would be served by allotting Channel 298C to Los Alamos, New Mexico, since it could provide the community with its third local commercial FM service. Channel 298C can be allotted to Los Alamos with a site restriction of 38.1 kilometers (23.7 miles) northeast to avoid a short-spacing to Station KMYI, Channel 296C2, Armijo, New Mexico, and Station KAMX-FM, Channel 300C, Albuquerque, New Mexico.[4]

7. We believe that KBOM has not presented evidence of sufficient weight to warrant the denial of petitioner's proposal. First, Channel 298C is a technically feasible channel. We have confirmed that a tower of 300 meters would provide Los Alamos with the required city grade service and a tower of such height comports with the Class C technical requirements. Further, the reference coordinates are not located in the Carson National Forest. Finally, although the usable transmitter site area appears to be entirely on land owned by the Bureau of Land Management, we find that this is not an impediment to the allotment. The BLM does permit transmitters to be built on their land, thus also permitting the necessary roads and power supply. While KBOM may be correct that it will not be inexpensive to make the necessary land improvements to support a radio transmitter, petitioner has stated his awareness of the situation and reiterated his intention to apply for the channel. KBOM has not provided information which would lead us to question petitioner's commitment.

8. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **July 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Los Alamos, New Mexico	253C, 294C1, 298C

9. The window period for filing applications will open on **July 14, 1992,** and close on **August 13, 1992.**

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[4] The coordinates for Channel 298C at Los Alamos are North Latitude 36-04-51 and West Longitude 105-58-41.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

SECOND REPORT AND ORDER

Adopted: April 9, 1992; Released: May 8, 1992

By the Commission: Commissioner Barrett issuing a statement.

Table of Contents

Topic	Paragraph No.
I. Introduction	1
II. Background	2
III. Issues	6
A. Per-Call vs. Per-Phone Compensation	6
B. Amount of Compensation	16
C. Administrative Mechanism for Collecting and Remitting Compensation	42
D. Miscellaneous Issues	55
1. Applicability of Compensation Mechanism to Aggregators	55
2. Cellular Payphones	58
3. Legal and Jurisdictional Arguments	62
IV. Ordering Clauses	66

I. INTRODUCTION

1. In this order, we prescribe a rate and mechanism for compensating competitive payphone owners (PPOs) for originating interstate access code calls.[1] We prescribe that PPOs receive $6 per phone per month. We further require that PPOs be responsible for billing and collecting this compensation from interexchange carriers (IXCs) that: (1) earn annual toll revenues in excess of $100 million; and (2) provide live or automated operator services. Each individual IXC's compensation obligation shall be set in accordance with its relative share of toll revenues among IXCs required to pay compensation. To enable operator services providers (OSPs) to verify their compensation obligations, we direct local exchange carriers ("LECs") to provide each OSP responsible for compensation with a quarterly list showing all customer-owned coin-operated telephone (COCOT) lines in their service areas. These decisions will ensure that PPOs receive fair compensation when callers exercise their option to use an OSP other than the OSP presubscribed to a competitive payphone line.

II. BACKGROUND

2. Prior to 1984, all pay telephones were owned and operated by the local telephone companies. In 1984, the Commission authorized competitive entry into the pay telephone marketplace by amending Part 68 of the Commission's rules to permit registration of competitively provided payphones.[2] There are now over 200, 000 competitively provided payphones in the marketplace, as compared with about 1.6 million LEC payphones.[3]

3. PPOs compete in the marketplace for payphone placements by offering premises owners a commission on coin and 0+ traffic originating from their payphones.[4] PPOs earn revenues by reselling local and 1+ longdistance service from their payphones and by presubscribing their payphones to IXCs or OSPs that pay commissions on 0+ traffic. Currently, PPOs earn no revenues when they originate an access code call. Consequently, some PPOs have sought to block the dialing of certain access codes, in particular, equal access (10XXX) codes.

4. In October 1990, Congress enacted the Telephone Operator Consumer Services Improvement Act (TOCSIA) which, *inter alia*, directed us to require the establishment of 800 and 950 access numbers and to consider the unblocking of 10XXX access from all aggregator locations, including competitive payphones.[5] Pursuant to this legislation, we have required PPOs to unblock 10XXX access.[6]

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[1] "Competitive" payphones or "competitively provided" payphones are payphones that are not owned by a LEC or AT&T. As defined in the Communications Act, as amended, an "access code" is a sequence of numbers that, when dialed, connects the caller to the OSP associated with that sequence, as opposed to the OSP presubscribed to the originating line. *See* 47 U.S.C. § 226(a)(1). Access codes include 10XXX in equal access areas and "950" Feature Group B dialing (950-0XXX or 950-1XXX) anywhere, where the three-digit XXX denotes a particular IXC. Some OSPs use an 800 number as an access code.

[2] Registration of Coin Operated Telephones Under Part 68, FCC 84-270, rel. June 25, 1984, 49 Fed. Reg. 27763 (July 6, 1984).

[3] *See* APCC Supplemental Comments in RM-6723, Bell Atlantic Petition for Rulemaking to Establish Uniform Dialing Plan for Pay Telephones, filed November 22, 1991, n.4, *citing* North American Telecommunications Association Telecommunications Market Review and Forecast, 1991 2d ed. at 142.

[4] A 0+ call occurs when the caller dials "0" plus the called telephone number. 0+ calls include credit card, collect, and third number billing calls.

[5] Pub. L. No. 101-435,104 Stat. 986 (1990)(codified at 47 U.S.C. Section 226)("TOCSIA"). Under the Communications Act, as amended, an "aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." Section 226(a)(2).

[6] We originally required PPOs to unblock 10XXX access by March 16, 1992. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, FCC

5. TOCSIA also directed us to consider whether PPOs should receive compensation for originating access code calls. We issued a notice of proposed rulemaking on February 13, 1991 inviting comment on this issue.[7] On July 11, 1991, we adopted a Report and Order and Further Notice of Proposed Rulemaking (the Further Notice or FNPRM) concluding that "considerations of equity require us to prescribe compensation" and seeking comment on an appropriate compensation rate and mechanism.[8]

III. ISSUES

A. Per-call vs. Per-phone Compensation

1. The Further Notice

6. The Further Notice tentatively concluded that compensation should be calculated on a per-call basis. We stated that a per-call charge would be preferable to a per-minute charge insofar as a per-call charge would require monitoring only of call completions, not call length. We invited comment on this tentative conclusion and on alternatives to per-call compensation.[9]

2. Positions of the Parties

7. All of the commenters addressing this issue support our tentative conclusion that a per-call rate is preferable to other types of rates.[10] APCC favors a per-call compensation because such a mechanism would allow competitive payphones with a high volume of access code calls to be fully compensated for the actual usage of their payphones.[11] MCI says that under a per-phone compensation mechanism, OSPs would be required to pay compensation for those payphones that generate few or no access code calls. MCI believes that result would be undesirable.[12]

8. While parties agree that per-call compensation is most desirable, they also agree that neither the PPOs nor the carriers have the information to perform the tracking necessary for a per-call mechanism. APCC states that PPOs do not currently have the ability to track completed access code calls from competitive payphones because most of these payphones do not have the ability to track dialed numbers. In addition, APCC asserts that even those PPOs that can track dialed numbers cannot determine with precision whether an access code call is completed or if it is interstate in destination.[13]

9. APCC and United state that an OSP tracking system would be substantially complicated by the fact that automatic number identification (ANI), which is necessary for an OSP to determine whether a call has originated from a competitive payphone, is transmitted only with Feature Group-D access. Therefore, they argue, OSPs, such as MCI, that instruct their calling cardholders to dial Feature Group-B (950-10XX) access, would not be able to identify those calls that originated from competitive payphones. APCC and United argue, further, that no OSP would be able to identify PPO calls that originate in nonequal access areas.[14]

10. Finally, LECs state that they cannot track completed access code calls because originating LECs do not generally receive answer supervision for such calls and therefore cannot determine whether a dialed access code call has actually been completed.[15] LECs state further that they cannot distinguish between 1-800 and 950 access code calls, on the one hand, and other 1-800 and 950 calls, on the other hand.[16]

11. In reply, CPA maintains that the LECs could and should be charged with call tracking responsibilities. Asserting that the only problem for the LECs would be in verifying call completion, CPA claims that LECs could acquire this capability, if necessary, or, alternatively, use one of the many surrogates available.[17] CPA suggests, for example, that statistical studies of the percentage of call attempts that are completed could be used to estimate the number of completed access code calls. Alternatively, it suggests that data on call duration be used as a basis for estimating call completions.

12. APCC argues that while tracking difficulties may preclude the deployment of a per-call compensation mechanism in the short-term, PPOs should nevertheless receive some form of compensation, if only on a flat rate per-phone basis, until such time as per-call compensation can be implemented.[18] APCC claims that per-phone compensation represents an attractive interim approach because it could be quickly implemented, is easily administered, and entails minimal risk of fraud and disputes as to the amount of compensation owed.[19]

3. Discussion

13. We conclude that, at least on an interim basis, PPOs must be compensated on a per-phone basis, rather than a per-call basis, for originating interstate interLATA access code calls. While compensating PPOs on a per-call basis for access code calls would have the benefit of creating

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91-214, 6 FCC Rcd 4736 (1991). We subsequently stayed this order, pending reconsideration of our unblocking requirements. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Order, CC Docket No. 91-35, FCC No. 92-101, released March 13, 1992.

[7] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Notice of Proposed Rulemaking, 6 FCC Rcd 1448 (1991).

[8] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, Report and Order and Further Notice of Proposed Rulemaking, 6 FCC Rcd 4736, 4745 (1991).

[9] 6 FCC Rcd at 4747.

[10] *See, e.g.*, APCC Comments at 3; AT&T Comments at 4-5; California Comments at 1; MCI Comments at 2; United Comments at 4; CPA Reply Comments at 2.

[11] APCC Reply at 7.

[12] MCI Reply at 5.

[13] APCC Comments at 4. PPOs cannot track dialed numbers (and thus access code calls) unless their payphones have station message detail recording (SMDR) capability, but, according to APCC, only 34% of competitive payphones currently have this capability. *Id.*

[14] *See* United Comments at 5; APCC Reply at 4, note 4.

[15] Pacific Bell Reply at 2. BellSouth expresses doubt as to whether an adequate tracking mechanism could be deployed at a rate low enough to generate demand for the service and produce revenue for the LEC. BellSouth Reply at 4.

[16] *See* Pactel Comments at 2. According to Pactel, statistical surrogates for this information are not reliable and likely would involve LECs in billing disputes between IXCs and PPOs. *Id.*

[17] CPA Reply at 6-7.

[18] APCC Reply Comments at 4-6. *See also* Intellicall Comments at 7; Nycom Reply Comments at 8.

[19] APCC Comments at 16.

greater incentives for PPOs to place their payphones in locations that generate the most interstate traffic,[20] it is not feasible to implement percall compensation at this time. The record makes clear that no entity currently has the ability to determine accurately the number of access code calls that originate from each competitive payphone. Nor does it appear that reliable surrogates have been identified that satisfactorily address all the tracking requirements. For example, while CPA suggests several surrogates for estimating the number of completed access code calls, CPA does not describe those surrogates in sufficient detail to establish their reliability for near-term implementation. Nor does any party address how LECs can distinguish access code calls from other 1-800 and 950 calls. Moreover, for the reasons stated in the Further Notice, we are reluctant to place the LECs in the position of tracking calls and calculating the amount of compensation owed their competitors in the payphone marketplace.[21]

14. While it is not possible to order immediate implementation of per-call compensation, we agree with APCC that PPOs should receive compensation now for their role in originating interstate access code calls. A per-phone mechanism represents an adequate substitute at this time for percall compensation. A per-phone system can be implemented quickly and at relatively little cost. In addition, it should be relatively easy to administer once it is in place. We therefore prescribe flat-rate per-phone compensation for PPO origination of interstate access code calls.

15. While we cannot order per-call compensation at this time, we direct the Chief, Common Carrier Bureau, to continue to consult with the industry to explore whether and how a per-call compensation mechanism might be implemented in the future.[22] If and when sufficient progress is made in this area, we will initiate a new proceeding to make appropriate changes in the compensation mechanism and rate that we adopt herein.[23]

B. Amount of Compensation

1. The Further Notice

16. The Further Notice did not adopt any tentative conclusions as to the amount of compensation that should be provided to PPOs. We did, however, suggest as a possibility a compensation rate of $.12 per call, which represents the average net revenues a PPO receives when it originates a local call.[24]

2. Positions of the Parties

17. Almost all of the parties that addressed a suggested compensation rate of $.12 per call criticized it.[25] AT&T claims that $.12 is too high; PPOs claim that it is too low. Many parties claim that the theory underlying the $.12 rate is flawed insofar as it equates compensation for local calls with compensation for interstate calls.[26] In addition, AT&T claims that the $.12 suggestion incorrectly assumes that each access code call displaces a local call.[27]

18. Parties offer a number of alternative theories upon which to base PPO compensation. AT&T, for example, proposes that compensation be based upon the incremental costs and investment incurred by PPOs in originating access code calls.[28] MCI proposes that compensation be based on rate-of-return ratemaking and urges us to require PPOs to submit sufficient data to permit calculation of an interstate revenue requirement.[29] As an alternative, MCI

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[20] While a per-minute rate would offer these same benefits, none of the comments advocate a per-minute rate, and a per-minute rate could be more difficult to administer than a per-call rate.

[21] Further Notice at 4747.

[22] In September 1991, APCC filed a motion asking us to require: (1) LECs to submit detailed data on the usage patterns and compensation levels for LEC payphones; and (2) LECs and OSPs to submit specific information on their capabilities for measuring and tracking 800,950, and 10XXX traffic. APCC argues that both categories of information already exist and are highly relevant to establishing both a compensation mechanism and compensation amount. A number of commenters oppose this motion on the grounds that the information sought by APCC is irrelevant to this proceeding and/or would be unduly burdensome to produce.

We deny APCC's motion. APCC has not demonstrated that the substantial information it seeks from LECs and OSPs is necessary for the disposition of the issues in this proceeding. For example, APCC has provided data on LEC access charges attributable to LEC payphones, even without the comprehensive data that APCC would have us require from each LEC. Moreover, information about the current tracking capabilities of the various entities has been submitted in the record. Nevertheless, if, in working with the industry to explore the possibility of a per-call compensation mechanism, the Common Carrier Bureau deems it necessary and appropriate to seek further information from the LECs and or OSPs, it should do so.

[23] We are today also adopting a Notice of Proposed Rulemaking to consider a "billed party preference" routing methodology for certain operator-assisted calls, including 0+ interLATA calls. As we stated in that Notice, in the event that we decide to mandate billed party preference, we could apply the compensation mechanism that we here adopt or some other mechanism so that PPOs are compensated for originating such calls. *See* Billed Party Preference for 0+ InterLATA Calls, Notice of Proposed Rulemaking, CC Docket No. 92-77, FCC # 92-169, adopted April 9, 1992, at para. 28.

[24] We derived this figure by subtracting from the average charge for a five-minute local payphone call ($.23) the average LEC charge for a same-zone daytime business call ($.09) and estimated coin collection costs ($.02). *See* Further Notice at 4747.

[25] Only United asserts that this is a reasonable proposal. United Reply at 6.

[26] *See, e.g.*, New York at 5; APCC Comments at 20.

[27] AT&T Comments at 3.

[28] AT&T Comments at 2-5. AT&T asserts that fixed costs, such as those associated with the purchase and installation of the payphone, the cost of the LEC line serving the payphone, and the cost of general maintenance and coin collection, should not be included in calculating incremental costs, since these costs are necessary for the overall operation of a PPO's business and are not specifically incurred for access code traffic. AT&T Comments at 5 note *.

[29] Specifically, MCI contends that PPOs should provide the following data: the number of payphones in service; their average age; total payphone investment; depreciation rate; payphone revenues; repair expenses; and the total number of calls originated. MCI Comments at 3. MCI proposes that this data be used to calculate a revenue requirement, which would consist of net investment (total investment minus depreciation reserve) plus net expenses (repair expenses minus revenues). It argues that the "dial equipment factor" for the LEC serving that payphone could be used to calculate an interstate revenue requirement, and that per call compensation would then be set by dividing the resulting figure by the number of calls. *Id.*

suggests that the Commission order LECs to "waive" the subscriber line charge assessed on PPOs because LEC payphones are not assessed these charges.[30]

19. PPOs voice strong objection to the AT&T and MCI cost-based proposals. They argue that it would be unfair to base compensation on incremental costs only, as proposed by AT&T, since this Commission has historically based rates on fully distributed cost methodologies.[31] PPOs claim that, in any event, AT&T's definition of incremental costs is underinclusive.[32]

20. Similarly, PPOs and Intellicall criticize MCI's proposal for factoring only repair expenses into the revenue requirement, while ignoring, *inter alia*, billing and collection expenses, validation expenses, subscriber line and other LEC charges, salaries, benefits, and taxes.[33] They argue, further, that it would be inappropriate to base PPO compensation on rate-of-return concepts. They assert that the volatility of their earnings would make it impossible to confine these earnings within rate-of-return parameters. In addition, they argue that mistakes in cost allocation could be devastating, since PPOs operate in a competitive market and would therefore be unable to recover any lost revenues resulting from such mistakes.[34]

21. PPOs generally suggest that compensation should be based on "market-driven" rates. APCC, for example, proposes an "opportunity cost" model for compensation, based on 0+ commissions. According to APCC, PPOs currently earn an average commission of $2.09 per interstate 0+ call.[35] APCC states that, as a result of our unblocking requirements, the average number of 0+ calls that PPOs originate is likely to decline in the near future from twenty per month to fifteen per month.[36] APCC proposes therefore that PPOs receive $10.45 per month ($2.09 x 5) as compensation for the opportunity cost of unblocking.[37]

22. APCC claims that other benchmarks corroborate the fairness of a $10.45 monthly per-phone rate. One such benchmark, it claims, is the interstate revenue requirement for the largest LECs' public payphones. According to APCC, LECs receive from $6.77 per month per payphone to $23.67 per month per payphone through interstate carrier common line charges, with an average recovery of $13.74 per payphone per month.[38] Another benchmark, offered by APCC is that of typical hotel/motel end user surcharges. APCC claims that an informal survey of District of Columbia hotels reveals that surcharges of $.50 to $1.00 for each call are "commonplace."[39] APCC argues that these surcharges suggest that it would be reasonable to charge from $.50 to $.75 for an interstate access code call (which, based on APCC's estimate of fifteen calls per month per phone, would translate into a monthly perphone payment of $7.50 to $12.25).

23. Intellicall, with support from Integretel, also proposes an opportunity cost-based compensation model, though a somewhat different one.[40] According to Intellicall, "the economically correct compensation level is the marginal opportunity cost of a dial-around call – the total compensation a [PPO] forgoes by sending a dial-around call to a non-presubscribed OSP rather than to the presubscribed OSP."[41] Thus, unlike APCC, which argues that compensation should reflect the increase in the average number of dialaround calls as a result of unblocking, Intellicall argues that all dialaround calls should be considered an opportunity lost for purposes of calculating compensation. On the other hand, whereas APCC estimated the average lost commission to be $2.09 per call, Intellicall suggests that it would be acceptable for the Commission to use as (the lowest reasonable) benchmark the average AT&T commission, which, according to Intellicall, ranges from $.31 per call to $.61 per call.[42]

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[30] MCI Reply at note 9.

[31] *See, e.g.*, Nycom Reply at 5-6. *See also* APCC Reply at 15.

[32] *See* Nycom Reply at 6-7 (AT&T erroneously excludes of upgrading payphone equipment to pass 10XXX+0 traffic and block 10XXX+1 traffic, costs of fraud prevention, including LEC screening and blocking services, and other costs); APCC Reply at note 16 (AT&T fails to include cost of converting payphones to 10XXX dialing capability).*See also* Intellicall Reply at 11-12 (AT&T's proposed incremental cost definition is even lower than "short run marginal cost").

[33] APCC Reply at note 17. *See also* Intellicall Reply at note 26.

[34] APCC Reply at 16-17; Intellicall Reply at 14-15.

[35] APCC bases this figure on a "non-scientific" survey of five PPOs "ranging in size from under a thousand to many thousand phones in service." The surveyed companies had a total of 26,500 payphones in service. APCC Comments, Exhibit 2, Table 1.

[36] APCC states that, according to the survey it commissioned of nine of the largest PPOs, each competitive payphone currently originates an average of 30 interstate long-distance calls. Of these 30 calls, APCC states, approximately 20 are currently dialed on a 0+ basis. After unblocking takes place, it states, the number of 0+ calls per payphone will decrease by approximately five calls, so that each competitive payphone will originate, on average, 15 0+ calls and 15 access code calls per phone. APCC Comments at 19-21.

[37] APCC Comments at 18-21, 24.

[38] APCC Comments at Table 2. APCC states that it calculated the interstate revenue requirement for payphones for each LEC based on publicly available ARMIS cost data, as reported in FCC TRP COS-1(P) report for the period July 1990 to June 1991. It states that it obtained the number of public access lines for each LEC from FCC published statistics on the number of public payphone lines in service. *See* APCC Comments at 22 and Table 2.

On March 19, 1992, APCC filed an *ex parte* letter asserting that "there appears to be an ambiguity as to whether the cost data analyzed in APCC's study included the interstate costs of the loops to which LEC pay telephones are connected." *See* letter from Robert F. Aldrich, Counsel for APCC, to Donna R. Searcy, Secretary, FCC, March 19, 1992. In fact, the ARMIS cost data contained in the FCC TRP COS-1(P) do include local loop costs.

[39] APCC Comments at 23.

[40] Intellicall Comments at 7-13; Integretel Reply at 5.

[41] Intellicall Reply at 4.

[42] Intellicall bases these estimates on the commission rates set forth in what it claims to be a standard AT&T-PPO contract, and on AT&T's operator service rates, as set forth in the FCC Interim Report Concerning Implementation of the Telephone Operator Consumer Services Improvement Act of 1990, Nov. 14, 1991, at Chart 5. For purposes of calculating the range of commission payments, Intellicall appears to have used three alternate assumptions: (1) that calls are uniformly distributed among all rate bands and time periods and equally divided between calling card calls and collect calls; (2) that calls are evenly divided between collect and calling card calls, but are all billed at daytime rates for the highest mileage band; and (3) that

24. Intellicall asserts that the marginal opportunity cost of initiating access code calls can be calculated not only with reference to PPO opportunity costs (that is, foregone commissions), but also with reference to the value to OSPs of one additional access code call. Intellicall estimates this value by adding: (1) the average access charge that OSPs pay for an interstate call of average length from a LEC pay phone, which APCC calculated to be fifty cents,[43] and (2) the tariffed recurring charges OSPs pay for 0- call transfer service, which, according to Intellicall, range from twenty-two cents to thirty-five cents.[44] Based on these figures, Intellicall argues that an OSP that subscribes to 0- transfer service necessarily places a value of from $.72 to $.85 on an access code call.[45] Intellicall therefore argues that a per-call compensation rate of $.72 to $.85 would be reasonable.

25. Nycom claims that since 0+ commissions have been negotiated between the payphone owner and the OSP, they reflect the amount each PPO has determined is necessary in order to recover its costs and earn a return on its investment.[46] Nycom states that each PPO should calculate the average compensation it receives for each 0+ call and receive this for its access code calls as well. Alternatively, Nycom suggests that compensation reflect the industry average compensation per 0+ call, and that we obtain data, subject to proprietary treatment, to calculate this average.[47]

26. AT&T, MCI, United, and New York dispute PPO claims that unblocking requirements create opportunity costs, arguing that these requirements would create opportunity costs only if callers were prevented from placing revenue-producing calls (local and 0+) because of the availability of payphones for access code calls. They state that since payphones are not used 24 hours a day, access code calls do not displace revenue-producing calls.[48]

27. These parties also challenge PPO calculations of opportunity costs.[49] In particular, they criticize opportunity cost models based on OSP 0+ commissions. They argue that 0+ commissions represent the value to an OSP of becoming the presubscribed carrier, not the value of receiving an access code call. They claim, further, that past commission levels reflect the added value to the presubscribed OSP of access code blocking and thereby constitute monopoly profits. According to New York, "providing [PPOs] with compensation for lost monopoly profits contradicts Congressional intent to encourage lower rates for credit card and third-party calls made from pay telephones.[50]

28. Some parties also criticize APCC's suggestion that LEC access charges could be a reasonable basis for determining PPO commissions. These parties contend that LEC access charges associated with the pay telephone element are not related to the actual costs incurred in LEC payphone operations, and that LEC payphone costs are likely to be different from PPO costs in any event.[51]

29. Finally, California argues that PPOs should be compensated for lost revenue related to handling access code calls and for maintaining payphone equipment. It notes that in California, PPOs receive twenty-five cents per call in compensation from the LEC for originating intraLATA credit card calls and argues that this same rate would be appropriate for interLATA interstate calls.[52] The California Payphone Association generally supports California's position but asserts that compensation should be at least $.30 per call.[53]

3. Discussion

30. After reviewing the various compensation theories and proposals submitted by the parties, we prescribe that PPOs be compensated $6 per payphone per month for originating interstate interLATA access code calls. We agree with those parties who argue there is no one "correct" compensation rate, but rather a range of reasonable rates. The $6 rate we now prescribe falls within the middle of this reasonable range.

31. We first reject arguments of several PPOs that their level of compensation should reflect their "opportunity costs" of initiating access code calls in lieu of 0+ calls that produce commissions from a presubscribed carrier. These arguments, most especially as styled by APCC, have as their goal ensuring that PPOs receive the same level of compensation overall for 0+ and access code calls as they did before they were required to unblock access code calls. However, we do not take as our public interest goal the maintenance of the PPO revenue streams that existed while PPOs or premises owners were permitted to funnel *all* operator-assisted traffic (other than 0-traffic) to the presubscribed OSP, whatever the wishes of the caller.[54] Since we have found that the blocking of access codes is an unreasonable practice, commission payments to PPOs premised on this practice would not be an appropriate basis for compensation.

32. We also reject arguments that we should base PPO compensation on the actual costs of the PPOs. Such an approach is neither feasible nor appropriate. First, individual cost data for each PPO is not available. Second, even if we attempted to elicit this data, it is questionable whether it would be of much value. PPOs are not required to

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all calls are collect and are billed at daytime rates for the highest mileage band. *See* Intellicall Reply at note 17 and at App. B, Chart 5.

[43] APCC calculated this figure in its April 12, 1991 Comments filed in response to the original Notice of Proposed Rulemaking. *See* APCC Comments, filed April 12, 1991 at 43-44.

[44] 0- call transfer service is a service offered by LECs to OSPs under which LECs transfer a 0- call (when a caller dials only the digit "0" and then waits for operator intervention) to the OSP requested by the calling party.

[45] Intellicall Comments at 10-11.

[46] Nycom Comments at 4.

[47] *Id.* at 4-5.

[48] *See* AT&T Comments at 3; MCI Reply at 3; United Reply at note 9; New York Reply at 3-5.

[49] *See* New York Reply at 3-5; United Reply at 5-6; MCI Reply at 3-4; AT&T Reply at 1-2.

[50] New York Reply at 5.

[51] *See, e.g.,* Pactel Comments at 3; MCI Reply at 4; Ameritech Reply at 4, 7-8.

[52] California Comments at 1-2. According to CPA, this twenty-five cent rate was the product of negotiations between California and other interested parties. *Id* at 3.

[53] CPA Reply at 3-4.

[54] We need not, and do not, join the definitional dispute among the parties as to whether PPOs actually incur "opportunity costs," as that term is defined in economic literature.

adhere to our Uniform System of Accounts[55] and therefore use a variety of accounting methodologies. In order to use the cost data provided by PPOs, we would have to make adjustments to all of this data to reflect uniform accounting principles. Third, the cost data submitted would have to be scrutinized for allowances and disallowances. The administrative and regulatory burdens entailed in these processes would be significant, to say the least. Moreover, unless we were prepared to undertake the heavy burden of reviewing individual PPO costs on an ongoing basis and making adjustments to PPOs' compensation based on changes in their costs, this methodology would not be any more valid than a number of alternative approaches. In some respects, this regime would be more burdensome than the price cap regime by which we regulate the rates of LECs, which have significant monopoly power in their interstate access markets. Given that the annual compensation prescribed here currently amounts to less than $15 million per year, we conclude that the administrative and regulatory burdens of determining compensation based on actual PPO costs would be completely disproportionate to any benefits offered by such an approach.[56]

33. On the other hand, a less burdensome cost-based approach would be both reasonable and viable. One such approach would be to examine, as a surrogate for PPO costs, the access charge compensation that a LEC receives for its regulated provision of payphones. Some parties counsel against using any such approach. These parties claim that LEC access charges do not reflect LEC costs with any precision, much less PPO costs. Nevertheless, interstate access charges have generally been determined with reference to LEC costs, which should bear at least a rough relationship to PPO costs. Moreover, we are using LEC access charge compensation only as a general surrogate, in conjunction with the other approaches discussed below, and not as a precise measure for determining PPO compensation. Therefore, we conclude that we can legitimately place some probative weight on LEC interstate access charge compensation in setting the PPO compensation rate for interstate access code calls. In addition, this approach has the advantage of furthering competitive parity between PPO payphones and competing LEC payphones.

34. The record includes significant information on LEC interstate access charge compensation for provision of its payphones. APCC submits data, unchallenged by other parties, showing that the largest LECs attribute an average of $13.74 per month in interstate access charge revenues to each of their payphones.[57] APCC claims that it would be reasonable for PPOs to receive this same amount for each PPO payphone for access code calls. APCC ignores, however, that PPOs receive revenues for 0+ traffic, while the LECs do not. In particular, while PPOs receive commission payments from OSPs for 0+ traffic, the Bell Operating Companies (BOCs) and GTE, which are presumably precluded under their respective consent decrees from entering into commission arrangements with OSPs, do not[58] Therefore, a compensation rate of $13.74 per phone per month would tend to overcompensate PPOs. On the other hand, since access code calls are projected to account for half of all interstate payphone calls after unblocking, it would appear to be reasonable to set PPO compensation at $6.87 per payphone per month, which is one half of the LEC interstate access charges attributable to LEC payphones.[59] In this manner, half of the costs are attributed to half of the traffic, and rough competitive parity is furthered as well.

35. A second reasonable approach would be to base PPO compensation on some measure of the value to OSPs of receiving access code calls. One potential measure is found in LEC 0- transfer service charges. Insofar as 0- transfer service enables OSPs to receive operator-assisted calls when that OSP is requested by the caller, this service is analogous in many respects to the service provided by PPOs in originating access code calls. In both situations the value provided to the OSP is the same -- the receipt of an interstate operator-assisted call. The only difference is how the caller indicates his choice of carrier -- in one instance by dialing "0" and orally conveying this choice to the LEC; in the other by dialing an access code before dialing "0" and the called number.

36. Interstate tariffed charges for LEC 0- transfer services range from a low of $.22 per call to a high of $.45 per call and are most commonly about $.35 per call.[60] In addition to these per-call charges, many carriers purchasing 0- transfer service must purchase a Feature Group-D trunk

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[55] 47 C.F.R. Part 32.

[56] AT&T argues that we should base PPO compensation rate on the incremental costs incurred by PPOs to handle access code calls. AT&T, however, offers no persuasive reasons why access code calls, as opposed to other categories of calls, should bear no share of the PPOs' non-incremental costs.

[57] APCC Comments at Table 2.

[58] While PPOs must, in order to compete effectively, pay a portion of these 0+ commissions to premises owners, they keep some of these commission payments for themselves. Moreover, PPOs with hundreds or thousands of payphones generally have more bargaining power than most individual premises owners and thus should be able to obtain the highest available commission payments from OSPs. *See* Intellicall Reply at note 14. Thus, PPOs can obtain a profit on 0+ calls, while still offering premises owners an attractive commission plan.

[59] APCC claims that each competitively provided payphone originates, on average, thirty interstate non-coin calls per month, about half of which after unblocking will be access code calls. No one disputes these projections. Moreover, this projection is generally consistent with projections attributed to AT&T in CC Docket No. 91-115 (Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards).*See* letter from George Vasilakos, President and Chief Operating Officer, Com Systems, to Donna Searcy, Secretary, FCC, March 3, 1992 (claiming that AT&T projects that by June, 1992, half of all operator-assisted calls will be access code calls).

[60] Intellicall's assertion that LEC 0- transfer service rates range from $.22 to $.35 ignores certain tariffs with somewhat higher rates. For example, the National Exchange Carrier Association tariff charge is $.46 per call. Southwestern Bell charges either $.30 or $.36 per call, depending upon where the call originates. Other tariff charges are within the range specified by Intellicall. Ameritech and Bell Atlantic charge $.22 per call. BellSouth, Contel, GTE, and Illinois Consolidated charge $.35 per call. New England Telephone charges $.33. *See* Ameritech Transmittal No. 425, February 16, 1990; Bell Atlantic Transmittal No. 262, September 6, 1988; BellSouth Transmittal No. 351, October 19, 1990; Contel Transmittal No. 61, June 21, 1990; GTE Transmittal No. 684, October 1, 1991; Illinois Consolidated Transmittal No. 38, October 25, 1989; NECA Transmittal No. 457, July 16, 1991; New England Telephone Transmittal No. 934, August 15, 1988.

between its point of presence and the LEC operator service switch. LECs filing interstate tariffs for this service have projected first-year demand of in excess of 250 million calls. Based on these data, and because of the similar value provided by 0- transfer services and access code call origination, we conclude that it would be reasonable to establish an access code compensation rate of about $.35 per call or, based on APCC's projection of fifteen access code calls per phone per month, $5.25 per payphone per month.[61]

37. A third reasonable approach to compensation would be to base it on AT&T's 0+ commissions. Because AT&T's operator service rates are regulated, AT&T is constrained from paying excessive commissions that provide monopoly rents to PPOs or premises owners. Thus, AT&T's commission should more closely reflect the fair value of the service provided by PPOs when they originate a particular interstate call.

38. According to Intellicall, AT&T's average commission payments for 0+ calls range from $.31 to $.61 per call. Intellicall derives these estimates from a standard AT&T competitive payphone commission contract and from AT&T's operator service rates. In calculating the range of AT&T's commissions, however, Intellicall makes certain assumptions about AT&T's traffic patterns and call distribution that appear to be unfounded. In particular, Intellicall makes alternative calculations based on three different sets of assumptions: (1) that AT&T's calls are evenly distributed between collect and calling card calls and among the various time and mileage bands; (2) that calls are evenly divided between collect and calling card calls but are all billed at daytime rates for the highest mileage band; or (3) that calls are all collect calls billed at daytime rates for the highest mileage band. Data submitted by APCC, however, suggest that approximately 60% of 0+ calling card calls and 26% of 0+ collect calls are billed at daytime rates, while about 24% of 0+ calling card calls and 44% of 0+ collect calls are billed at evening rates, and 16% of 0+ calling card and 31% of 0+ collect calls are billed at night/weekend rates.[62] These data tend to refute Intellicall's assumptions that calls are evenly distributed among time bands or that they are all placed at daytime rates. Moreover, APCC data suggests that at least half, and probably more than half, of all access code calls are calling card calls, not collect calls.[63] Since AT&T's calling card rates are lower than its rates for collect calls, overestimating the percentage of calls made on a collect basis would tend to inflate the average commission payment.

39. Adjusting for these factors, and assuming that from half to three quarters of all access code calls are made on a calling card basis, the average AT&T commission payment on an access code call (with commission rates of twelve or seventeen percent) would range from about $.30 per call to about $.46 per call.

40. These estimates are further corroborated by data submitted by APCC as to the 0+ commissions paid by AT&T to American Payphones, Inc. (API). According to APCC, from August 1989 to January 1991, AT&T paid API $84,091 in commissions for 209,212 completed calls.[64] This translates into a rate of 40.2 cents per call. To the extent AT&T's commission rate reflects the fair value of the service provided by PPOs in originating interstate access code calls, this rate further supports a $6 per-phone monthly compensation rate.

41. In sum, there is no single correct way to establish a compensation rate for PPOs, and there is no single correct amount that should be prescribed. Instead, there are a number of possible reasonable approaches to compensation, each of which has a rational basis. We have identified and applied three reasonable approaches that, we believe, establish a range of reasonable compensation rates. That this is a relatively small range and that these three different approaches produce similar results, underscores in our view the validity of these results. Rather than choose among these theories, we establish a compensation rate of $6 per phone per month, which is generally consistent with all of them.

C. Administrative Mechanism for Collecting and Remitting Compensation

1. The Further Notice

42. The Further Notice tentatively concluded that the compensation system should be administered through direct billing arrangements between PPOs and OSPs.[65] We stated that direct billing would have the advantage of involving only those entities that will most benefit from access code calls -- OSPs, who will receive the calls, and PPOs, who will be compensated for originating them. We stated, further, that it would be inappropriate to burden third parties, such as the LECs, with compensation obligations, since these parties do not benefit directly ei-

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[61] While Intellicall argues that the 0- transfer service fees should be added to LEC access charges to establish what OSPs are willing to pay for an access code call, that approach would create the perverse result of charging OSPs twice for LEC access charges -- once as incorporated in the PPO commission, and again as charged by the LEC. We believe that the 0- transfer charge itself -- apart from the access charges -- more closely reflects the value that the PPO provides in originating an access code call.

[62] *See* letter from Robert F. Aldrich, Counsel for APCC, to Donna R. Searcy, Secretary, FCC, March 19, 1992. According to APCC, these statistics are based on an analysis of 0+ traffic data included in OSP reports filed with the FCC. APCC further states that these statistics encompass 0+ traffic originating from all aggregator locations, except for hotels and motels.

[63] *Id.* Specifically, APCC submits data showing that half of all 0+ calls are calling card calls. *Id.* In addition, Intellicall provides data indicating that just under half (45%) of 0+ calls originating from Intellicall equipment are calling card calls. Letter from Michael R. Wack, counsel for Intellicall, to Donna R. Searcy, Secretary, FCC, March 19, 1992. For purposes of prescribing access code call compensation, however, it is more useful to look at the percentage of *access code calls* that are dialed with calling cards versus those made on a collect basis. While specific data on these percentages is not available, we believe it is reasonable to assume that the percentage of access code calls that are placed with calling cards is likely to be somewhat higher than the percentage of 0+ calls made with calling cards, since, among other reasons, access code dialing instructions appear on most OSP calling cards.

[64] *See* Letter from Robert F. Aldrich, counsel for APCC, to Donna R. Searcy, Secretary, FCC, March 20, 1992.

[65] 6 FCC Rcd at 4746-47.

ther from access code calls or from PPO compensation. We also suggested that limiting administrative responsibilities to entities that directly benefit from access code calls or compensation would likely maximize incentives for harmonious and cooperative working relationships among the system administrators. In addition, we stated that direct billing would permit OSPs and PPOs a greater degree of flexibility to create more efficient and reliable implementation mechanisms.[66]

43. We tentatively rejected two alternative mechanisms -- a pooling mechanism and an APCC-proposed LEC-administered system, wherein LECs would credit each PPO on that PPO's telephone bills for compensation earned and then add those amounts to the carrier common line (CCL) charge.[67] We tentatively concluded that pooling appeared to be too costly and administratively complex. Likewise, we tentatively found that using LEC call accounting and access charge systems would be problematic in that it would: (1) inappropriately spread the cost of payphone compensation over all interstate calls via CCL charges, thus forcing all interstate callers to bear a cost only associated with access code calls; (2) require LECs to channel compensation to their competitors; and (3) place LECs in the position of being the focal point of disputes over compensation between the OSPs and the PPOs.[68]

2. Positions of the Parties

44. APCC maintains that, notwithstanding our concerns about a LECadministered compensation mechanism, such a mechanism would be most appropriate, in that it would utilize existing accounting and access charge systems and could thereby be implemented most quickly and at little cost.[69] APCC states, further, that while the CCL charge represents the most convenient means of collecting compensation from OSPs, this is not the only mechanism available to LECs. APCC asserts that LECs could simply issue bills to OSPs, separate and apart from their access charge bills, and thereby avoid using the CCL charge. APCC states that in rendering such bills, LECs could apportion each OSP's contribution based on some measure of its overall market share, such as its share of interstate switched access minutes, or its share of presubscribed lines.[70]

45. CPA, arguing that "billing or crediting by LECs would provide the most efficient means of implementing the Commission's compensation mechanism," endorses APCC's proposal for a LEC-administered approach.[71] Other commenters oppose a LEC-administered system and favor a direct billing system between PPOs and OSPs, as proposed in the Further Notice. H [72]

46. Several commenters offer suggestions on how a direct billing mechanism would best be implemented. For example, United argues that OSPs should initiate payments to PPOs, rather than respond to invoices from them.[73] AT&T argues that any OSP should be permitted to require PPOs to register their payphones with the OSP prior to receiving compensation.[74] Other commenters urge the Commission to convene a public negotiating session to reach a consensus on direct billing arrangements.[75] Most LECs argue that they should not be required to play any role in the administration of a direct billing arrangement. Nevertheless, United joins APCC, AT&T, and MCI in arguing that LECs should provide information to OSPs regarding the operating status of COCOT lines in order to facilitate OSP verification of their compensation obligations.[76]

47. APCC suggests that if direct billing on a per-call basis proves not to be possible because of call tracking difficulties, the use of a neutral clearinghouse operation to compile data from various sources regarding payment rights and obligations might permit a per-call compensation mechanism to be implemented. APCC states that a

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[66] FNPRM, Paragraph 41.

[67] In our February 1991 NPRM, we had solicited comment on two possible pooling mechanisms. The first mechanism would require each IXC to submit to the pool administrator a report of the total number of calling minutes generated by access code calls to that IXC from private payphones. The administrator would then assess and bill each IXC a per-minute charge for such calls. IXCs would pay these charges into the compensation pool, and the administrator would distribute compensation to PPOs based on their reports of the number of access code calling minutes originating from their payphones.

The second pooling mechanism would involve a payphone compensation pool to which each IXC would contribute a certain percentage of its estimated gross proceeds from all interstate payphone calls, whether or not an access code was used. Each PPO would then receive compensation from the pool equal to a percentage of all interstate revenue generated by its payphones. 6 FCC Rcd at 1450-51.

[68] FNPRM, Paragraph 40.

[69] APCC Comments at 2-3. 9-10. APCC states that it is exploring other possible mechanisms with OSPs, including a system involving a neutral clearinghouse. *See infra*. at para. 47.

[70] APCC Comments at 15.

[71] CPA Reply at 4.

[72] *See e.g.*, MCI Comments at 2, 4; Nycom Comments at 7; Pactel Comments at 1; Ameritech Comments at 3; United Comments at 4; Integretel Reply at 1; AT&T Reply at 3. These commenters generally oppose a LEC-administered system for the reasons we identified in the Notice. *See, e.g.*, Ameritech Comments at 3-4; United Reply at 4 (*quoting* Notice); New York Reply at 6 (LEC involvement could result in spreading costs of compensation over all interstate calls via CCL charges).

[73] To minimize administrative costs, United proposes that the frequency of OSP payments should vary with the amount due. For example, it suggests that compensation could be disbursed on a monthly basis to PPOs owed $20 or more per month, and on a quarterly basis if the monthly payment obligation was less than that amount. United Comments at 4-6.

[74] AT&T proposes that registration data include the location of payphones, the number for each instrument, and appropriate tax identification information. IXCs should also be allowed to demand documentary evidence of each payphone's ownership to prevent fraud. Each compensation plan should specify an audit and claim mechanism. AT&T Comments at 6-7.

[75] APCC Comments at 7; Nycom Comments at 6-7. *Contra* Pacific Bell Reply at 4.

[76] *See* United Comments at 6; AT&T Reply at 3-4; MCI Reply at 5; APCC Comments at 15. United, assuming that OSPs would be responsible for initiating per-call compensation to PPOs, proposes that LECs provide to OSPs the following information: the name of the PPO, the name and address of the payphone location, the identity of the LEC end office, the information digits used to signify a competitive payphone line, and the PPO payment address. United Comments at 7. AT&T contends that PPOs should provide the following information for use by the OSPs: the location of each payphone, the number of each payphone, and the appropriate tax identification data. AT&T Comments at 6.

clearinghouse could register PPOs and verify the status of competitive payphones; collect data from PPOs, LECs, and/or OSPs, as necessary to determine payment obligations and rights; aggregate this data; and issue bills to OSPs and checks to PPOs. In addition, APCC states, the clearinghouse could arbitrate disputes between PPOs and OSPs regarding the accuracy of the call information used to calculate OSP bills.[77]

48. APCC, Nycom, and Intellicall argue that the prescribed compensation mechanism should be made effective immediately.[78] On the other hand, United suggests a nine-month lead time from the date of publication of a final order to payment of compensation.[79]

3. Discussion

49. We now affirm our tentative conclusion that compensation should be administered through direct billing and/or payment arrangements between PPOs and OSPs. Particularly in light of our decision to prescribe a per-phone compensation rate, a direct billing/remittance mechanism should be relatively simple to administer. At the same time, this mechanism gives OSPs and PPOs the incentive and ability to adopt billing and payment procedures that minimize transaction costs and maximize the efficiency with which bills are sent and/or payments are made. Thus, for example, PPOs are free to determine for themselves the frequency with which to send compensation bills. In addition, PPOs and OSPs are free to agree that bills are not necessary, as United suggests, and that OSP payment obligations can be established without a PPO bill. PPOs and/or OSPs are also free to retain the services of one or more clearinghouses to assist them with billing and collection and/or payment.[80]

50. A direct billing mechanism also has the advantage of minimizing the role of the LECs in the compensation process and avoiding the need to rely on the CCL charge as a collection mechanism. While APCC correctly notes that LECs could simply issue bills instead of using the CCL charge, we see no reason why LECs should assume this responsibility for their competitors in the payphone marketplace.

51. In concluding that direct billing or compensation is the most appropriate compensation mechanism, we also take steps to facilitate this mechanism and minimize the administrative burdens it presents. First, we limit responsibility for competitive payphone compensation to those IXCs that both: (1) earn annual toll revenues in excess of $100 million, as reported each year in the FCC staff report entitled "Long Distance Market Shares;"[81] and (2) provide live or automated operator services. We note that there are approximately 455 IXCs currently purchasing switched access, a great many of which provide operator services.[82] To extend compensation obligations to all of these carriers would have significantly increased the administrative costs of a compensation mechanism. By contrast, limiting compensation obligations to IXCs providing operator services who earn $100 million or more in annual toll revenues (there are currently fourteen such carriers) will substantially ease the administrative burdens of billing and collection. Moreover, IXCs earning less than $100 million in toll revenues per year collectively account for less than five percent of long-distance carrier toll revenues.[83] Individually, they account for a much smaller percentage. Therefore, the payment obligations of these carriers, had they been included, would have been quite low in any case.

52. We conclude that each individual IXC's compensation obligation shall be set in accordance with its relative share of toll revenues among IXCs required to pay compensation.[84] Although it would be most desirable to apportion responsibility for compensation based on the relative portion of the total access code calls each OSP receives from competitive payphones, neither PPOs nor OSPs have the data necessary for such an apportionment. Since no party has demonstrated that basing each OSP's payment obligations on its share of toll revenues would produce substantially different results from basing these obligations on the relative portion of PPO access code calls received, we adopt toll revenues as a basis for apportionment.[85]

53. Second, we require LECs to provide each OSP responsible for compensation with a list each quarter of all telephone lines taking COCOT service in the LECs' region. This information -- which should be provided in a format to be agreed upon by the LECs and those OSPs paying compensation -- will enable OSPs to verify their compensation obligations.[86] While throughout this proceeding, we have repeatedly expressed our desire to avoid unnecessary LEC involvement in the compensation mechanism, we believe that the burdens associated with generating such information will be minimal. On the other hand, alternative verification methods, such as on-site inspections, would put a substantial burden on the OSPs.

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[77] APCC Comments at 8-9.

[78] APCC Reply Comments at 8; Nycom Comments at 8; Intellicall Reply Comments at 18.

[79] United Comments at 6, n.4.

[80] We note that APCC suggested that we establish a clearinghouse to facilitate the exchange of data between the parties and ease the administrative burden of billing and paying compensation. We decline to require establishment of such an operation. If the parties involved in billing and paying deem a clearinghouse to be an efficient and cost-effective way to meet their obligations they have every incentive to pursue this approach.

[81] This report is generally released in June of each year. The most recent such report was issued on June 28, 1991. *See* Long Distance Market Shares: First Quarter, 1991, Industry Analysis Division, FCC, June 28, 1991, at Table 4.

[82] *See* Trends in Telephone Service, Industry Analysis Division, Common Carrier Bureau, FCC, February 1992, at Table 20.

[83] *Id.* at Table 26.

[84] The initial compensation amounts to be paid by each IXC are set forth in Appendix B. Compensation obligations shall be adjusted periodically if the operational status of any eligible IXC changes or in accordance with revised toll revenue data. In either such event, the Common Carrier Bureau shall issue a public notice showing the revised compensation obligations. The revised obligations shall become effective on the date specified in the public notice.

[85] If and when a per-call compensation mechanism is substituted for a per-phone mechanism, this apportionment will no longer be necessary.

[86] We would expect the industry to work out in short order a reasonable computerized format that would greatly facilitate the reporting of COCOT lines by the LECs and the verification of working payphones by IXCs responsible for paying compensation.

Any PPO whose payphones do not use a COCOT line will be responsible for providing sufficient verification information to those OSPs to which it sends bills.

54. These compensation obligations shall become effective as of the first of the month following publication of a summary of this order in the Federal Register. We see no reason to delay the effective date of compensation either until a per-call mechanism can be devised or for nine months, as United suggests. Indeed, in view of the immediate effects of unblocking, we find good cause to make this order effective in less than 30 days.[87]

D. Miscellaneous Issues

1. Applicability of Compensation Mechanism to Aggregators

55. The Georgia Department of Administrative Services (DOAS) and the South Carolina Division of Information Resource Management (DIRM)[88] request that the Commission broaden the compensation mechanism prescribed herein to encompass state governments and other aggregators, such as college dormitories or hospitals, that permit access code dialing.[89] They assert that they currently receive substantial revenues through 0+ commissions and that they stand to lose large portions of these revenues as access code dialing increases.[90] They argue, further, that these revenue losses will be accompanied by added costs due to increased fraud and/or the costs of equipment modifications necessary to allow access code dialing.[91] They argue that we have recognized the impact of these revenue losses and costs in our decision to prescribe compensation for PPOs, and that the same considerations apply to aggregators.[92] In addition, the Georgia DOAS argues that providing compensation to PPOs, but not aggregators, places the LECs at a competitive disadvantage in the payphone marketplace, since PPOs will receive revenues for access code calls that they can share with premises owners, whereas the LECs and their customers will receive nothing.[93]

56. Other commenters addressing the Georgia DOAS and South Carolina DIRM requests oppose extension of compensation to aggregators.[94] AT&T claims that we have already concluded that aggregators, other than PPOs, are not to be included in a compensation plan.[95] United argues that we have held that consideration of compensation for aggregators is beyond the scope of this proceeding, and that requests to extend compensation to these entities are in reality untimely petitions for reconsideration.[96]

57. We now deny the requests of Georgia DOAS and the South Carolina DIRM to extend compensation to aggregators other than PPOs, including colleges and universities.[97] As we noted in the Further Notice, aggregator compensation was raised neither in TOCSIA nor in the Notice of Proposed Rulemaking in this docket, and is consequently beyond the scope of this proceeding.[98] If these issues are raised in a petition for declaratory ruling or a petition for rulemaking, we will address them at that time.

2. Cellular Payphones

58. Two cellular PPOs, Cellular and PetroComm, ask that we either adopt a mechanism by which they can recover cellular airtime charges on access code calls, or that we exempt them from our unblocking requirements.[99] They state that if they unblock, they stand to lose the cellular airtime charge that the presubscribed OSP currently bills and remits to them.[100] They claim that AT&T and MCI have refused to bill airtime charges for them.[101] PetroComm, which provides cellular service on offshore oil rigs, states that it will terminate its cellular payphones unless its concerns are addressed.[102]

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[87] *See* 5 U.S.C. Section 553(d)(3).

[88] The Georgia DOAS describes itself as a division of the Georgia State Government that "is responsible for provisioning telecommunications services to all state agencies, boards, and commissions, including state Colleges and Universities." Georgia DOAS Comments at 1. The South Carolina DIRM describes itself as "a division of the South Carolina Budget and Control Board which is charged with procuring and overseeing the operation of telecommunications facilities and services for all state agencies and institutions, including the state owned college and university system, and pay telephones and other telephone systems located at those facilities." South Carolina DIRM Comments at 1.

[89] On February 6, 1992, the Association of College and University Telecommunications Administrators, the American Council on Education, and the National Association of College and University Business Officers filed a petition seeking clarification that colleges and universities are "aggregators" only with respect to pay telephones located on college and university campuses. On March 2, 1992, we invited public comment on this petition. Cite. Comments were filed on March 31, 1992. Reply comments are due April 17, 1992. This petition is currently pending.

[90] Georgia DOAS Comments at 1; South Carolina DIRM Comments at 2.

[91] Georgia DOAS Comments at 4; South Carolina DIRM Comments at 3.

[92] The South Carolina DIRM argues that an end-user surcharge on access code calls would not be practicable because any such surcharge would likely spark widespread protest by students and parents. South Carolina DIRM Comments at 7. Similarly, Georgia DOAS claims that a surcharge would "not be in the best interest of either the consumer or the state[.]" Georgia DOAS Comments at 2.

[93] Georgia DOAS Comments at 2.

[94] APCC Reply Comments at 17-18; AT&T Reply Comments at 3; BellSouth Reply Comments at 4-5; United Telecommunications Reply Comments at 6.

[95] AT&T Reply at 3.

[96] United Reply at 7.

[97] "[W]e decline to address the issue of whether aggregators... should be compensated for access code calls. This issue was not raised by [TOCSIA] or the [February 1991] NPRM and is therefore outside the proper scope of this proceeding." FNPRM, Paragraph 35, n.131.

[98] *See* 6 FCC Rcd at 4746, n.131. AT&T is incorrect in its claim that we have concluded that aggregators other than PPOs are not entitled to compensation. Rather, we concluded that consideration of this issue was beyond the scope of this proceeding.

[99] Cellular Comments at 1,4,6; PetroComm Comments at 7,11-12.

[100] *See* PetroComm Comments at 8-9.

[101] Cellular Comments at 4; PetroComm Comments at 9.

[102] PetroComm Comments at 7.

59. GTE asks us to clarify that its Airfone, used onboard airplanes, is not covered by TOCSIA.[103] GTE argues that if unblocking requirements apply to Airfone, these phones should be part of a compensation mechanism that accounts for the unique circumstances of Airfone service.[104]

60. AT&T agrees that the status of cellular carriers under TOCSIA is uncertain. It argues, however, that these carriers should be exempt from unblocking requirements only if they are not "aggregators," within the meaning of that Act, and that they should receive compensation only if they are PPOs, as contemplated by TOCSIA. It takes no position, however, on these issues.[105] United opposes compensation for cellular airtime, claiming that this issue is beyond the scope of this proceeding and that we lack authority to prescribe such compensation, since it was not addressed in TOCSIA.[106]

61. We conclude that the concerns raised by the cellular payphone providers are beyond the scope of this proceeding. As noted, the issue of whether our unblocking requirements apply to GTE's Airfone has been raised in another proceeding. Questions about the applicability of these requirements to other cellular services may likewise be raised in a petition for declaratory ruling or a petition for rulemaking. They are not properly raised here. Similarly, requests for compensation for cellular airtime charges are beyond the scope of this proceeding.

3. Legal and Jurisdictional Arguments

62. RCI, citing the definition of "operator services" in TOCSIA, argues that we lack jurisdiction to prescribe compensation for calls "answered by automatic equipment that will complete calls only if the customer inputs a Personal Identification Number (PIN) before or after the number being called, and does not provide an operator to handle any other billing arrangement."[107] We disagree.

63. TOCSIA directs us to consider "the need to prescribe compensation (other than advance payment by consumers) for owners of competitive public pay telephones for calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones."[108] The language of the statute, when read in conjunction with the legislative history, makes clear that we are to consider the need to prescribe compensation for PPOs for all calls made with an access code, regardless of whether they are handled on an automated basis by the OSP, and regardless of whether the caller identifies itself to the OSP by entering a PIN. Thus, the definition of "operator services" in TOCSIA expressly incorporates both automated and live operator service systems.[109] Moreover, the Senate Report on this provision provides that "operator services include...any assistance provided either by a 'live' person or by automation, such as voice recordings or 'bong-in-a-box' services."[110] The Report states that "[c]arriers may not escape this definition by employing a particular technology that does not involve a 'live' operator."[111] Nor is there any indication in the legislative history that Congress intended to exclude from any compensation mechanism access code calls billed to the caller's previously established account. Rather, the Senate Report states that we should consider compensation "for calls made using an access code" without reference to the way the caller identifies itself to the OSP.[112]

64. While at first glance there appears to be an inconsistency within TOCSIA in that the "operator services" definition also contains an exclusion for "calls completed through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer," a closer examination of the overall statute and its legislative history shows that Congress could not have intended for this exclusion to apply to the compensation provision.[113] Indeed, if the exclusion were so applied, it would cover virtually all access code calls, thereby completely nullifying the intent of the compensation provision. In addition, application of the exclusion to PPO compensation would be illogical. From the PPO's standpoint, it makes no difference whether an access code call is delivered to a live operator or an automated operator service system or whether the caller identifies itself to the OSP by entering a PIN. If compensation is warranted in the one instance, it is warranted in the others.

65. In fact, the Senate Report clearly demonstrates that the exclusion contained in the statutory definition of "operator services" was enacted for the purpose of limiting the notice requirements set forth in Section 226(b) to those situations in which those requirements were necessary. Thus, the Report states: "If a consumer dials an access code number, the consumer presumably knows the identity of the provider and is comfortable with the service and rates provided by that carrier. (In other words, the consumer already has made an informed choice of that carrier)."[114] Moreover, the exclusions that RCI would read into the PPO compensation provisions of TOCSIA are illogical and clearly at odds with Congress' purpose. Therefore, we reject RCI's argument that we lack jurisdiction to adopt the rules set forth in this order.[115]

IV. ORDERING CLAUSES

66. Accordingly, IT IS ORDERED, that pursuant to authority contained in Sections 1, 4, 201-205, 218, 220, and 226 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154, 201-205, 218, 220, and 226, that the policies, rules, and requirements set forth herein ARE ADOPTED.

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[103] GTE has filed a petition seeking a declaratory ruling that Airfone is not subject to TOCSIA. In re Petition for Declaratory Ruling that GTE Airfone, GTE Railfone, and GTE Mobilenet are not subject to TOCSIA, MSB-92-14, filed March 6, 1992.

[104] GTE Comments at 2-3.

[105] AT&T Reply Comments at 3.

[106] United Reply Comments at 6-7.

[107] RCI Reply at 2.

[108] 47 U.S.C. Section 226(e)(2).

[109] 47 U.S.C. § 226(a)(7).

[110] S. Rep. No. 439, 101st Cong., 2d Sess. 11 (1990), *reprinted at* 1990 U.S. Code Cong. & Ad. News 1577, 1582 ("Senate Report").

[111] *Id.*

[112] *Id.* at 6.

[113] *See id.* at 19-20.

[114] *Id.* at 11.

[115] Nycom argues that we should detariff LEC payphones and treat them as customer premises equipment. This argument, which is the subject of another, pending proceeding, is beyond the scope of this proceeding. *See* Public Telephone Council Petition for Declaratory Ruling that Bell Operating Company Pay Telephones are Customer Premises Equipment for Regulatory Purposes, filed July 18, 1988.

67. IT IS FURTHER ORDERED, that the Chief, Common Carrier Bureau, is delegated authority to act upon matters pertaining to implementation of the policies, rules, and requirements as set forth herein.

68. IT IS FURTHER ORDERED, that APCC's Motion for Collection of Information IS DENIED.

69. IT IS FURTHER ORDERED, that the decisions in this Report and Order concerning implementation of an interim per-phone compensation mechanism SHALL BE EFFECTIVE, and compensation shall begin to accrue, on the first day of the month following publication of a summary of this Report and Order in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION1U

Donna R. Searcy
Secretary

APPENDIX A

List of Parties Filing Comments and Replies:

American Public Communications Council (APCC)***

American Public Telecommunications, Inc. (APT)*

American Telephone & Telegraph Company (AT&T)***

Ameritech Operating Companies (Ameritech)***

BellSouth Telephone Companies (BellSouth)**

California Public Utilities Commission (California)*

California Payphone Association (CPA)**

Cellular Inc. (Cellular)*

Citizen Utilities Company of California (Citizen Utilities)**

Georgia Department of Administrative Services (Georgia DOAS)*

GTE Service Corporation (GTE)*

Integretel, Inc. (Integretel)**

Intellicall, Inc. (Intellicall)***

MCI Telecommunications Corporation (MCI)***

National Association of Regulatory Utility Commissioners (NARUC)*

National Telephone Cooperative Association (NTCA)**

New York Department of Public Service (New York)**

Nycom Information Services, Inc. (Nycom)***

Pacific Bell and Nevada Bell (Pactel)***

Petroleum Communications, Inc. (PetroComm)*

RCI Long Distance, Inc. (RCI)**

South Carolina Division of Information Resource Management (South Carolina DIRM)*

Southwestern Bell Telephone Company (SWBT)***

United States Telephone Association (USTA)***

United Telecommunications, Inc. (United)***

US West Communications, Inc. (US West)**

* Filed Comments only

** Filed Reply only

*** Filed both Comments and Reply

APPENDIX B

INITIAL INTERIM COMPENSATION OBLIGATION FOR EACH COMPETITIVE PAYPHONE

IXC	% of Toll Revenues	Amount Per Phone Per Month
AT&T	68.82	$4.129
MCI	15.02	.901
Sprint	10.24	.614
Metromedia Commun. Corp.	.77	.046
Williams Telecomm. Group	.76	.046
Cable & Wireless	.73	.044
Advanced Telecomm. Corp.	.69	.041
Allnet	.66	.040
Alascom	.53	.032
Intl. Telecharge, Inc.	.47	.028
Litel Telecomm., Inc.	.44	.026
LDDS Commun., Inc.	.31	.019
RCI Corp. /RCI Network Serv.	.29	.017
Comsys Network Services	.26	.016

One IXC included in the June 1991 report "Long Distance Market Shares," Telesphere Network, Inc., is no longer operating and is thus not subject to the compensation obligations established in this Order.

APPENDIX C

AMENDMENT TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Part 64, is amended as follows:

PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

1. The authority citation for Part 64 is amended to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154, unless otherwise noted. Interpret or apply secs. 201-4, 218, 225, 226, 227, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 201-4, 218, 225, 226, 227 unless otherwise noted.

2. New subpart M is added to read as follows:

Subpart M -- Competitive Payphone Compensation

Section 64.1301

(a) Each competitive payphone shall be eligible for compensation in the amount of $6 per payphone per month for originating interstate access code calls. "Competitive payphones" are those pay telephones not owned or controlled by the local exchange carriers (LECs) or AT&T.

(b) This compensation shall be paid by interexchange carriers (IXCs) that both:

(i) earn annual toll revenues in excess of $100 million, as reported in the FCC staff report entitled "Long Distance Market Shares;" and

(ii) provide live or automated operator services. Each individual IXC's compensation obligation shall be set in accordance with its relative share of toll revenues among IXCs required to pay compensation. For example, if total toll revenues of IXCs required to pay compensation is $50 billion, and one of these IXCs earned $5 billion in total toll revenues, the IXC must pay $.60 per payphone per month.

(c) Initial compensation obligations are set forth in Appendix B of the Commission's Second Report and Order in CC Docket No. 91-35, FCC No. 92-170, released May 8, 1992. Compensation obligations shall be adjusted periodically if the operational status of any eligible IXC changes or in accordance with revised toll revenue data. In either such event, the Common Carrier Bureau shall issue a public notice showing the revised compensation obligations. These revised obligations shall become effective on the date specified in the public notice.

(d) IXCs obligated to pay compensation and competitive payphone owners are responsible for establishing their own billing or payment arrangements.

(e) LECs shall provide IXCs paying compensation under Section (b) and (c) above with a list each quarter of all telephone lines receiving customerowned coin-operated telephone (COCOT) service in the LEC's region as of the date the list was generated.

SEPARATE STATEMENT OF COMMISSIONER ANDREW C. BARRETT

Re: Operator Service Access and Pay Telephone Compensation [CC Docket 91-35]

I agree with the Commission's decision today to prescribe a rate and mechanism for compensating private pay phone owners for originating interstate access code calls. I support, as an interim solution, the recommendation that the pay phone owners be paid on a per-phone basis at the compensation rate of $6.00 per payphone per month. Although I continue to believe that the best long term solution is to require compensation on a per-call basis, I do recognize that such an approach is not feasible at this time. I therefore support the Order as a reasoned compensation surrogate and an equitable interim solution which can be implemented immediately.

I also support the Order's conclusion of instituting a direct billing system. This mechanism should be simple to administer, and should give the OSPs and the pay phone owners the incentive and ability to adopt efficient billing procedures applicable to their situation. I am pleased that the Order rejected the notion of a pooling mechanism. First, such a mechanism would have inappropriately spread the cost of payphone compensation over all interstate calls. It would have also placed the LECs in middle of disputes over compensation between OSPs and the pay phone owners.

In conclusion, I fully support the Commission's decision to grant interim compensation to pay phone owners. However, I would like to emphasize my continued interest in pursuing a more long-term solution as soon as it is technically feasible to do so. I do believe that a per-call mechanism is a more cost-based solution and has the advantage of offering better incentives in terms of the placement of pay phones based on traffic concentration. For these reasons, I fully expect the Bureau to keep me apprised of the progress being made on this issue and look forward to the parties' continued participation in this matter.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-342

In re Application of

PONTCHARTRAIN BROADCASTING COMPANY, INC. File No. BPCT-870330KT

For Construction Permit for New UHF Television Station, Channel 62, Hammond, Louisiana

MEMORANDUM OPINION AND ORDER

Adopted: May 13, 1992; Released: May 29, 1992

By the Review Board: MARINO (Chairman) and ESBENSEN. Board Member BLUMENTHAL concurring with Statement.

1. The Review Board has under consideration a Petition for Reconsideration, filed April 14, 1992, by Pontchartrain Broadcasting Company, Inc. (PBCI). PBCI seeks reconsideration of our *Decision*, 7 FCC Rcd 1898 (Rev. Bd. 1992), which affirmed the *Supplemental Initial Decision*, 6 FCC Rcd 5025 (ALJ 1991) (S.I.D.), of Administrative Law Judge Edward J. Kuhlmann (ALJ), denying PBCI's application on financial qualifications and false financial certification issues. PBCI contends that the Board's *Decision* "contains material factual errors in its analysis of PBC[I]'s financial certification." PBCI Br. at 1-2. Our *Decision* also affirmed the ALJ's rejection of a post-hearing amendment proffered by PBCI on May 9, 1991, in which PBCI sought to establish its financial qualifications. We concluded that the amendment could not be accepted in light of "the concatenation of facts and circumstances . . . that PBCI intended to, and did, attempt to deceive the Commission and the ALJ as to its financial qualifications." 7 FCC Rcd at 1903. The Mass Media Bureau, which originally excepted to PBCI's disqualification, filed Comments on April 23, 1992, supporting the petition for reconsideration, urging the Board to receive PBCI's amendment, which would moot the financial issue, and grant PBCI's application. For the reasons stated below, we will deny the petition for reconsideration.

PETITION

2. PBCI argues that, in upholding the ALJ's adverse ruling on the false financial certification issue, the Board relied heavily on a statement by one of PBCI's shareholders, Milo Beaver, that he had met with Jack Blossman, President of Parish National Bank, and provided Blossman with information about PBCI's application and the television market. Beaver's declaration, which was included in PBCI's direct written case Exhibit 11, and which PBCI acknowledged was untrue, was signed under penalty of perjury on November 1, 1989. Beaver was the individual who had certified in PBCI's original application that PBCI was financially qualified. Adverting to language in ¶ 16 of our *Decision* that Beaver knew the statement to be untrue but, nonetheless, submitted the sworn declaration to the forum, PBCI argues that "the Board either did not realize, or erroneously discounted, the fact that Beaver corrected the statement concerning his subsequent meeting with Blossman *voluntarily on direct examination before the exhibit was even offered into evidence*." PBCI Br. at 5. PBCI argues that at the time Beaver signed PBCI Exhibit 11, he was merely "following the instructions and bad advice of [attorney] Tom Root, who subsequently was disbarred permanently after pleading guilty to five felony counts related to his professional conduct." *Id.* at 7.

3. The remainder of PBCI's petition does not pertain to asserted factual errors, but is mainly devoted to arguments that Beaver should have been able to rely on advice of FCC counsel concerning the Commission's financial requirements; that there was no evidence of deceit on Beaver's part in relying on a post-certification bank loan commitment letter for $5 million when he admittedly knew the lending limit of the bank was between $1 and $1.4 million; that the ALJ and the Board were wrong in considering the abilities of the PBCI shareholders to meet their subscription agreements in certifying to their financial qualifications; and that the purported clarity of the language of the instructions to the financial section of FCC Form 301 provided no basis for finding that Beaver falsely certified to PBCI's finances, particularly in light of the advice received from the then-FCC and local counsel concerning PBCI's financing.

DISCUSSION

4. It is well-settled that reconsideration is appropriate only where the petitioner has shown manifest error or omissions so material that their correction will result in substantial alteration of the original decision. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966). Reconsideration will not be "granted merely for the purpose of again debating matters on which tribunal has once deliberated and spoken." *Id.* Here, the matter relating to Beaver's declaration had been presented in PBCI's exceptions (at Appendix A, ¶ 5), considered by the Board, and rejected, *see* 7 FCC Rcd at 1902 ¶ 16. To the extent that PBCI now argues that Beaver was merely following the instructions of his attorney, that is not a mitigating factor, especially where he was aware of the misleading nature of the statement (and yet acquiesced in his attorney's misconduct), which was the case here. *See generally James C. Sliger*, 70 FCC 2d 1565, 1572-1573 (Rev. Bd. 1979) (subsequent history omitted). In any event, the alleged error complained of, even if valid, would not have been critical to our holding, which was based on the ALJ's findings extensively detailed in ¶¶ 3-7 and 12-13 of our *Decision*. The remainder of PBCI's arguments are merely PBCI's version of the facts, which were previously considered and rejected by the Board. We have again reviewed the record in light of PBCI's arguments and perceive no basis for departing from our previous *Decision*.

5. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed by Pontchartrain Broadasting Company, Inc. on April 14, 1992, and supplemented on April 30, 1992, IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] The Board Chairman adheres to the views set out in note 1 of our *Decision*, 7 FCC Rcd at 1904.

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

I agree with the denial of reconsideration, but do comment on one limited aspect of the case.

In part, our disqualification of the petitioner flowed from its principal's submission of written testimony regarding a purported bank loan, which testimony was admittedly false when submitted.[1] Petitioner claims, however, that its principal "voluntarily" retracted his false testimony at hearing, and that this retraction removes the onus of the admittedly false exhibit testimony.[2]

In *Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986), the Commission held that, although an applicant principal had there provided *totally* false deposition testimony,[3] a falsehood also *later* admitted, her conduct represented only "isolated instances of misconduct not warranting disqualification." Petitioner's conduct here, at least insofar as the submission of false testimony, was in my view certainly no worse than that occurring in *Broadcast Associates*.

More recently, though, in *Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992), and invoking a much *older* line of cases, the Commission disqualified an elderly applicant who understated her age (by 3 years),[4] and was held to be otherwise "evasive" in her testimony. The Commission there stated that "[w]hile the various discrepancies and evasions might not individually be significant, collectively they require the denial of her application."[5]

Assuming *Richardson* to reflect the most current state of the law on character and candor, the petitioner here cannot be excused, if we are to avoid inconsistency -- indeed flagrant caprice -- in our formal adjudications.

FOOTNOTES TO CONCURRING STATEMENT

[1] The Petition, at p. iv, states:

> Although Milo Beaver was fully aware he had not met with Jack Blossman, president of Parish National Bank, at the time he signed his prepared testimony in PBC Exhibit 11, Beaver never intended to deceive the Commission with respect to the circumstances surrounding the issuance of the October 31, 1989 letter from the bank.

[2] *See id.*

[3] *See* 100 FCC 2d 616, 622-24 (Rev. Bd. 1985). Therein the Board held that the deponent's testimony was, entirely, a "richly detailed fabrication" which, along with a false engineering certification, rendered that applicant untrustworthy for licenseship.

[4] The disqualified *Richardson* applicant testified that she had been born in 1922; the actual year was 1919. *See* 7 FCC Rcd at 1589 n.6.

[5] 7 FCC Rcd at 1585 (footnote omitted).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-80

In the Matter of

Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands — RM 7909

NOTICE OF PROPOSED RULE MAKING

Adopted: April 9, 1992; Released: May 8, 1992

Comment Date: June 29, 1992
Reply Comment Date: July 14, 1992

By the Commission: Commissioners Quello and Duggan issuing separate statements.

I. INTRODUCTION

1. We are issuing this *Notice of Proposed Rule Making* to solicit public comment on a range of proposals designed to reduce the delays associated with the processing of applications for stations in the Multipoint Distribution Service (MDS),[1] thereby allowing entities licensed in the MDS, particularly wireless cable operators, to realize their competitive potential. Specifically, under consideration are proposals to (1) reorganize various aspects of the MDS processing and regulatory scheme; (2) streamline the rules and technical standards governing MDS operations; and (3) remedy several difficulties that have arisen with respect to the processing of pending MDS applications by modifying our existing processing procedures.

II. BACKGROUND

2. Generally, an MDS station provides an omni-directional, one-way radio transmission of information for simultaneous reception at multiple fixed points within the station's service area.[2] The frequencies originally allocated for MDS use include, in fifty of the largest metropolitan areas, two single-channel, 6 MHz-wide channels designated channel 1 (2150-2156 MHz) and channel 2 (2156-2162 MHz), and in all other regions, one single-channel, 6 MHz-wide MDS channel (channel 1), and one single-channel, 4 MHz-wide Channel 2A (2156-2160 MHz).[3] In addition, in 1983, the Commission reallocated eight channels (the E group and the F group channels)[4] from the Instructional Television Fixed Service (ITFS) to the MDS.[5] Most recently, in October of 1991, the H-channels, formerly a part of the Private Operational-Fixed Microwave Service (OFS), were reallocated to the MDS. " [6]

3. Originally, it was anticipated that frequencies in the MDS would be used primarily for the transmission of business data, video teleconferencing, and other forms of high-speed computer information.[7] In response to the growing demand for video entertainment programming, however, MDS frequencies are now predominantly used for the provision of "wireless cable," a multichannel video distribution medium that resembles cable television, but that uses microwave channels rather than coaxial cable or wire to transmit programming to subscribers.[8]

4. On several occasions, we have recognized the strong public interest in removing regulatory obstacles to the development of wireless cable as a viable competitor to traditional cable television systems.[9] To promote our ongoing efforts to facilitate wireless cable as a competitive multichannel source of video programming, we recently amended our rules to eliminate numerous impediments to the effective delivery of wireless cable service. For example, in October of 1990, we released a *Report and Order* that increased the availability of MDS channels for use in wireless cable systems by eliminating MDS ownership restrictions and simplifying certain rules governing the application process, the initiation of service on new

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[1] Throughout this proceeding, "MDS" will be used to refer collectively to the single channel (MDS) and multichannel (MMDS) MDS authorizations unless otherwise indicated. We propose to amend our rules to reflect this practice.

[2] In re Applications of Midwest Corp. and Two-way Radio of Carolina, Inc., 53 FCC 2d 294, 296 (1975).

[3] *See generally* Report and Order, Docket No. 19493, 45 FCC 2d 616 (1974). Throughout this proceeding, we refer to channels 2 and 2A collectively as channel 2.

[4] The specific frequencies associated with the E channels are: channel E1 (2596-2602 MHz); channel E2 (2608-2614 MHz); channel E3 (2620-2626 MHz); and channel E4 (2638-2644 MHz). The specific frequencies associated with the F channels are: channel F1 (2602-2608 MHz); channel F2 (2614-2626 MHz); channel F3 (2626-2632 MHz); and channel F4 (2638-2644 MHz).

[5] *See generally* Report and Order, Gen Docket No. 80-112, 94 FCC 2d 1203 (1983).

[6] Second Report and Order, Gen Docket No. 90-54, 6 FCC Rcd 6792, 6795 (1991).

[7] Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987).

[8] *See* Report and Order, CC Docket No. 86-179, 2 FCC Rcd 4251, 4252 (1987).*See also* Second Report and Order, Gen Docket No. 90-54, 6 FCC Rcd at 6792-93. The use of the term "wireless cable" in this context does not imply that the service constitutes cable television for any statutory or regulatory purpose. *See* Report and Order, MM Docket No. 89-35, 5 FCC Rcd 7638, 7639-41 (1990) (the definition of a "cable system" does not include infrared transmissions such as MDS), *remanded on other grounds sub nom.* Beach Communications, Inc., et al. v. FCC, No. 91-1089 (D.C. Cir. March 6, 1992). Typically, wireless cable operators use some combination of the thirteen MDS channels available on a full-time basis and twenty channels in the ITFS available to them on a leased, part-time basis to transmit video entertainment programming to subscribers.

[9] *See, e.g.*, Notice of Proposed Rule Making and Notice of Inquiry, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 971 (1990). *See also* Report and Order, PR Docket No. 90-5, 6 FCC Rcd 1270, 1271 (1991) (permitting OFS eligibles to engage in the distribution of video entertainment material in an effort to increase the competitive potential of alternative multichannel operators visa-vis cable systems); Report, MM Docket No. 89-600, 5 FCC Rcd 4962, 4972 (1990) (discussing the fact that cable systems possess a disproportionate share of market power).

channels, and the modification of existing operations.[10] In addition, on September 26, 1991, we adopted a *Second Report and Order* that, among other things, reallocated the three OFS H-channels to the MDS so that these channels may be used for the distribution of video entertainment material and other MDS-type programming with relaxed administrative and operational burdens.[11]

5. Despite these measures, the competitive potential of wireless cable remains largely unrealized. To a substantial extent, this is because approximately 20,000 MDS applications, some dating back as far as the 1980 and 1983 filing periods, remain pending before the Commission.[12] This large and aging backlog is the result of the interplay between our existing MDS processing rules and policies,[13] the fact we have been unable to allocate sufficient resources to the processing of MDS applications, and a torrent of MDS filings, the majority of which are believed to be speculative.[14] The impact of this backlog on the wireless cable industry has been devastating. Wireless cable operators have been unable to gain access to the number of channels necessary for them to meet subscriber demand and match competitors' offerings.[15] Meanwhile, delays in the processing of MDS applications have allowed traditional cable systems to further strengthen their position in the multichannel video distribution marketplace, making the task of providing meaningful competition more difficult for rival operators. We initiate the instant proceeding with the primary objective of facilitating the licensing of MDS entities and, we hope, reversing these trends. The proposals advanced herein are designed to expedite the provision of wireless cable service by deterring speculative filings and, where possible, streamlining the processing of MDS applications, while at the same time honoring our commitment to safeguard the operations of ITFS licensees.[16]

III. DISCUSSION

6. **Relocation of MDS processing**. As indicated, we are considering various proposals to reorganize the MDS processing and regulatory scheme. Specifically, we have developed four options to this effect: (1) to relocate some or all aspects of the processing of MDS applications to the Private Radio Bureau's Licensing Division in Gettysburg, Pennsylvania, and to have either the Common Carrier Bureau or the Mass Media Bureau process the remaining aspects and regulate the service, (2) to relocate both MDS processing and regulation to the Private Radio Bureau, (3) to relocate MDS processing and regulation entirely to the Mass Media Bureau, and (4) to leave both MDS processing and regulation in the Common Carrier Bureau.

7. Our proposals to relocate some or all aspects of MDS processing to the Private Radio Bureau's Licensing Division stem from the fact that the procedures currently used to process Part 94 private radio applications have been used in the context of 900 MHz point-to-multipoint and H-channel applications, both of which are processed similarly to MDS. As such, we view relocating the processing of MDS applications to the Private Radio Bureau as an available method for assisting our goal of eliminating the existing backlog of MDS filings, thereby accelerating the effective delivery of service. We request commenters' views on all aspects of this proposal.

8. Although under our first proposal MDS operators would be regulated by either the Common Carrier Bureau or the Mass Media Bureau, we are also interested in commenters' views as to whether the MDS has evolved in a manner that makes it appropriate for us to reclassify the service as a wholly private radio service to be regulated under Part 94. In posing this broad question, we specifically request commenters to discuss whether (1) a functional distinction between common carrier and non-common carrier MDS offerings continues to exist, and (2) under *National Association of Regulatory Utility Commissioners v. FCC*,[17] even common carrier MDS licensees

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[10] *See* Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd 6410 (1990). *See also* Order on Reconsideration, Gen Docket Nos. 90-54, 80-113, 6 FCC Rcd 6764 (1991).

[11] Second Report and Order, Gen Docket Nos. 90-54, 80-113, 6 FCC Rcd at 6792.

[12] There have been four separate MDS application filing periods: (1) the single channel MDS filing period which started in 1974 and continues to the present; (2) the September 9, 1983 one-day filing period for MMDS applications, *see* Report and Order, Gen Docket No. 80-112, 94 FCC 2d at 1266; (3) the post-April 20, 1988 through October 31, 1990 filing period, *see* Public Notice, DA 88-562, 2 FCC Rcd 2661 (1988); and (4) the filing period applicable to applications filed November 1, 1990 through the present, *see* Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd at 6424. The rules and procedures applicable to each described group of applicants are slightly different. Under existing procedures, single-channel MDS licenses are awarded via comparative hearings, and MMDS licenses are awarded through random selection procedures.

[13] Among the rules and procedures that have contributed to the backlog of MDS applications are the following: (1) the fact that comparative hearings, which are extremely time-consuming and resource-intensive, are used to select among the single-channel MDS applications; (2) the existence of rules requiring Commission engineering staff to review analyses submitted by applicants and petitioners in order to assure protection to ITFS licensees, *see* 47 C.F.R. § 21.901; (3) relatedly, the existence of rules requiring Commission staff to verify antenna patterns and type-acceptance of proposed equipment, *see* 47 C.F.R. § 21.906, 21.908; and (4) rules allowing the filing of numerous petitions to deny and petitions for reconsideration.

[14] Our records reflect that in Fiscal Year 1990 almost 6,000 MDS applications were filed, and that approximately 12,000 MDS applications were filed in Fiscal Year 1991. Applications are currently being filed at the rate of approximately 1,000 per month. The filing of MDS applications appears to be particularly appealing to application mills in part because our existing rules authorize lotteries and settlement groups. *See* 47 C.F.R. §§ 21.33(b), 21.901(d)(2), 21.901(f)(1). In this proceeding, we are considering rule changes that would prohibit partial settlements. *See infra* paras. 17, 21. *See also* Petition for Rule Making, RM 7909, filed by the Wireless Cable Association (December 12, 1991).

[15] *See* Report and Order, Gen Docket Nos. 90-54, 80-113, 5 FCC Rcd at 6411. *See also* Report and Order, PR Docket No. 90-5, 6 FCC Rcd at 1272 (eliminating the limitation on the number of frequencies per site available to OFS eligibles seeking to engage in the distribution of video entertainment material).

[16] *See infra* para. 15.

[17] 525 F.2d 630, 641-42 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). We expressly recognized that non-common carrier MDS operators are essentially private carriers when we created the status election. *See* Report and Order CC Docket No. 86-179, 2 FCC Rcd at 4262 n.11. Application of *National Association of Regulatory Utility Commissioners v. FCC* to common carrier MDS providers could lead to an identical conclusion because (1)

appear indistinguishable from traditional private carriers.[18] We also ask commenters to discuss any potential benefits that would inure to wireless cable operators as a result of being reclassifed as private radio licensees.

9. Recognizing that there are other methods for eliminating the MDS application backlog, we are also considering the third option delineated above, to relocate MDS processing and regulation to the Mass Media Bureau. We request commenters to discuss the relative merits of this proposal. In particular, we seek commenters' views as to whether the fact that the Mass Media Bureau is the situs for the processing and regulation of ITFS operations makes it most logical for us to process and regulate the MDS in the Mass Media Bureau as Mass Media service.

10. Finally, we also seek commenters' views as to whether the processing of MDS applications should remain the province of the Common Carrier Bureau. In particular, we request commenters to discuss whether, in their view, the rule changes we are considering in this proceeding would alone be sufficient to expedite MDS processing.

11. **Proposed Rule Changes**. Regardless of which Bureau processes and/or regulates the MDS, we are also considering the adoption of certain new rules and technical standards to be used to govern MDS operations. These new rules are set forth for public comment in Appendix B and need not be reiterated in detail here.[19] We believe, however, that it would be beneficial to highlight several pronounced departures from existing Part 21 rules and practices that are being considered as part of our effort to streamline the MDS regulatory scheme. In developing each of the suggested rule changes, we have attempted to balance in an equitable manner the interests of existing MDS operators as well as those of MDS applicants. Commenters are explicitly asked to discuss the impact on both of these groups of each rule change under consideration.

12. First, it is possible that the processing of MDS applications could be expedited by modifying the interference protection criteria currently contained in 47 C.F.R. § 21.902. Under the existing criteria, MDS applicants are required to submit detailed analyses of the potential for harmful interference to co- and adjacent channel stations. The advantage of the existing criteria is that they afford licensees a high degree of flexibility in designing their systems. On the other hand, the disadvantage of the existing criteria is that their use is believed to slow processing because Commission engineers are required to evaluate each applicant's submissions. One alternative to interference analyses is the use of separation standards. Under this alternative, MDS applicants would no longer be required to engineer their systems to provide 45 dB desired-to-undesired signal (C/I) ratio of co-channel interference protection. Rather, they would be required to certify that their proposed facilities would be located at least 80 km[20] from all existing[21] and previously applied-for co-channel stations.[22] Similarly, MDS applicants would no longer be required to engineer their systems to provide C/I protection of 0 dB to adjacent channel licensees.[23] Applicants would instead be required to certify that their proposed facilities are at least 48 km[24] from all existing and pre-

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these licensees may not appear to have market power, negating the public interest reasons for requiring them to hold themselves out as providing service to the public indiscriminately, and (2) they may not in fact appear to engage in a nondiscriminatory holding-out of service to the public.

[18] *See* In re Orth-o-vision, Inc., 69 FCC 2d 657, 666 (1978), *recon. denied*, 82 FCC 2d 178 (1980) (pre-empting state and local rate and entry regulation of MDS operations), *review denied sub nom.* New York State Comm'n on Cable Television v. FCC, 669 F.2d 58 (2d Cir. 1982).

[19] Although Appendix B reflects the proposed rule changes in the context of Part 21, the proposed rules are equally suitable for inclusion in either Part 74 or Part 94 of our Rules.

[20] In developing the 80 km co-channel separation criterion, we assumed that the height-above-average-terrain (HAAT) of an MDS transmitting antenna would be 180 meters. At that height, assuming "flat-earth," line-of-sight signals extend to a distance of 56 km. Thus, if two co-channel MDS transmitters are located 80 km apart, a signal from the first transmitter would not reach any receiving antennas located within a radius of 24 km of the second system's transmitter. We request commenters to discuss the appropriateness of our assumed value for transmitting antenna HAAT. A higher transmitting antenna HAAT would result in greater coverage by an interfering signal and would thus require co-channel MDS transmitters to be located farther apart. Similarly, a lower transmitting antenna HAAT would allow cochannel transmitters to be located closer together. In addition, we seek comment as to whether an HAAT limitation should be placed on MDS transmitting antennas to prevent the possibility of interference resulting from MDS transmitting antennas operating at HAATs greater than 180 meters (or whatever HAAT value is used to determine the co-channel separation). We also seek comment as to whether the height of receiving antennas should be taken into consideration in determining the appropriate co-channel separation distance. Under this proposal, we would continue to permit MDS licensees to employ signal boosters and would also continue to require that signal booster signals not extend beyond a licensee's service area. We would not, however, continue to require licensees to license individual signal booster stations.

[21] For purposes of calculating the co- and adjacent channel separation requirements between MDS applicants and existing licensees, the latter would include all conditional licenses and licenses granted under Part 21 as of the effective date of the new MDS rules.

[22] Under these rules, we would employ available remedies, such as possible denial with prejudice of all applications filed by the offending applicant in all markets, or referral to the Department of Justice for possible criminal prosecution pursuant to 18 U.S.C. § 1001, in response to the submission of a false certification.

[23] To provide adequate protection to existing MDS licensees, we would retain the power limitations currently set forth in Part 21. Thus, the maximum allowable EIRP would continue to be 33 dBW, and no limit would be placed on transmitter output power.

[24] The 48 km value is determined to be the distance between two adjacent channel MDS tranmitters where the receiving antennas of each system located at the common edge of their 24 km service areas would receive on-channel and adjacent channel signals of equal strength. When this occurs, the protection at such receive sites will be equal to that currently afforded receive sites under our existing 0 dB D/U criterion. In determining this separation criterion, we assumed that the co-channel and adjacent channel base transmitters would be operating with the same equivalent isotropic radiated power (EIRP) in the direction of the receiving antennas and that the receiving antennas are omni-directional. We solicit comment as to whether these assumptions and the corresponding 48 km adjacent channel separation criterion are appropriate.

viously applied-for adjacent channel stations.[25] If the suggested separation standards are adopted, the 48 kilometer separation requirement would not apply to an applicant proposing to co-locate with the transmitter of an existing or previously applied-for adjacent channel station.[26]

13. We solicit comment with respect to all aspects of the separation standards delineated above. In particular, commenters are asked to set forth their views as to the sufficiency and necessity of the suggested criteria, and to discuss the perceived impact thereof on proposed and existing MDS operations in terms of, *inter alia*, the avoidance of harmful interference and spectrum efficiency.

14. In addition, either in conjunction with the proposed separation standards or as an alternative thereto, we request commenters to discuss whether we should adopt a table to facilitate short-spacing of stations. Such a table is currently used to process short-spaced applications in the Specialized Mobile Radio Service, and we have found that the table promotes spectrum efficiency and operational flexibility.[27] Accordingly, we have devised a proposed short-spacing derating table, which is included in Appendix B, for use by MDS applicants. Commenters are asked to discuss the permissible separations reflected in the table, and to suggest alternatives. In this connection, we emphasize that the flexibility afforded to applicants as the result of procedures such as short-spacing necessarily exacts a toll on the speed of processing. We solicit commenters' impressions as to the desirability of routine short-spacing in view of the impact thereof on both existing operators and our effort to facilitate the processing of MDS applications. Finally, we ask commenters to discuss the relative merits of a proposal to retain our existing co- and adjacent channel interference criteria, and to address the impact that the retention of these standards would have on our goal of expediting the processing of both backlogged and new MDS applications.

15. In a related vein, we are also considering requiring MMDS applicants to satisfy the 80- and 48-kilometer separation standards with respect to all existing co-channel and adjacent channel ITFS licensees.[28] Moreover, as part of our ongoing commitment to the development of ITFS as an effective source of the distribution of educational material, we are considering requiring MDS applicants to provide existing co- and adjacent channel ITFS entities the following additional measures of protection: (1) all existing co-channel ITFS registered receive sites must be protected in accordance with the 45 dB desired to undesired signal (C/I) ratio, and (2) all adjacent channel ITFS registered receive sites must be protected in accordance with the 0 dB (or 10 dB, where applicable) C/I ratio. MDS licenses would be conditioned on meeting these criteria in actual practice.[29] We believe that the use of these protection

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[25] Following the effective date of the new MDS rules, applicants for MDS channels would be required to certify, by a specified date, satisfaction of the new separation standards with respect to both existing co-channel and adjacent channel licensees as well as all previously filed pending applications. Applications filed or tentative selectees selected prior to the effective date of the new rules would not be summarily dismissed for failure to have demonstrated satisfaction of these new standards. However, after an opportunity to amend has been provided, the new criteria would be applied to such applications, and those specifying sites within 80 km of existing cochannel licensees or within 48 km of existing adjacent channel licensees would be dismissed. Similarly, applications filed prior to the effective date of the new rules would not be summarily dismissed for failure to have demonstrated satisfaction of the separation standards with respect to all previously applied-for co-channel and adjacent channel stations. Rather, all MDS applications for co-channel or adjacent channel stations inside the required separation distances from previously applied-for stations would be considered mutually exclusive if timely filed. Depending on the initial date of filing, they may be subject to lottery pursuant to 47 C.F.R. § 1.972. We would be permitted to apply the new separation standards to previously filed applications under *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956). Applicants would be given a limited opportunity to amend their applications to take the new rules into consideration and, if necessary, bring their applications into compliance therewith. *See infra* para. 20.

[26] In order for an applicant to be considered co-located with an adjacent channel facility, the coordinates of both transmitters must be identical and the later applicant must demonstrate that it will not interfere with the adjacent channel existing facility or previously filed application. Under our proposal, failure to make such a showing would result in dismissal. In addition, it is conceivable that we would be required to restrict the operational parameters of proposed facilities to minimize interference.

[27] *See* Report and Order, PR Docket No. 90-34, 6 FCC Rcd 4929 (1991).

[28] For this purpose, we would treat pending and future MDS applications in a manner identical to that set forth in note 25, *supra*. We also request comment on whether existing adjacent channel MDS licenses, conditional licensees and applicants should receive protection from ITFS applications in this fashion.

[29] In addition, all ITFS *registered* receive sites in existence at the time the MDS transmitter is licensed would be given actual protection in accordance with 47 C.F.R. § 74.903(a)(2). Furthermore, MDS licensees would be required to contact any ITFS co-channel or adjacent channel licensee within 112 km (70 mi.) or 80 km (50 mi.), respectively, of the MDS transmitter site at least 14 days prior to operating and to notify the ITFS licensee of the exact time that operations will begin. If no interference occurs to the ITFS operator, or if the ITFS operator fails to complain, the MDS license would become unconditional with respect to the need to protect ITFS co-or adjacent channel licensees after 30 days of continuous on-air operation. During this 30-day period, however, the MDS operator would be required to make every effort to ensure that the ITFS operator is aware of the actual hours of operation. If interference were to occur, the Commission could require the MDS operator to cease operating immediately without a hearing. We solicit comment, however, as to whether a method for more immediate relief should be considered. An MDS operator that failed to comply with a request that it cease operations would be subject to forfeiture or license revocation in accordance with our rules. Before resuming normal operations, an MDS operator that had ceased operating because of interference to the protected ITFS operations would be required to reduce its signal to the required levels, as measured at the output terminals of the ITFS receive antenna. This may be accomplished by any mutually-acceptable means, such as a reduction of the MDS station power, use of a directional antenna at the MDS transmission site, provision of an improved antenna for the ITFS receive site(s), or any combination thereof. Failure of the MDS operator to take such measures would result in license cancellation for failure to comply with the express condition requiring the avoidance of harmful interference to licensed ITFS stations. The ITFS operator would be required to cooperate in all tests and measurements. Any ITFS operator that failed to cooperate fully would receive protection based on measurements using an equivalent antenna in the immediate area of the ITFS receive antenna and would lose the right to request cessation of the MDS station's operations. Under this scheme, we propose that

standards could serve the public interest in two discrete respects. First, as discussed in the preceding paragraph, the simplification of the interference criteria could help facilitate the expeditious processing of MDS applications, thereby speeding the provision of service to the public. In addition, the use of stringent ITFS protection standards would likely promote the public interest by enhancing the quality of ITFS transmissions. Commenters are asked to discuss all aspects of the proposed separation standards as they pertain to ITFS entities.

16. We are also considering replacing the requirements currently set forth in 47 C.F.R. §§ 21.15(a) and 21.900, pursuant to which an MDS applicant must demonstrate (1) that the applicant is legally, financially, technically, and otherwise qualified to render the proposed service; (2) that there are frequencies available to enable the applicant to render satisfactory service; and (3) that it has a station site available, with a certification that these things are true. A similar certification requirement is used under Part 94, and has proved as effective as the more onerous requirements contained in the rule parts cited above. We solicit commenters' views on these suggestions, and in addition request commenters to address whether some of these requirements should simply be eliminated altogether.

17. As additional components of our effort to streamline MDS regulations and processing procedures, we also are considering disallowing settlement agreements among MDS applicants, and prohibiting applicants from holding *any* type of interest, including serving as an officer, director, shareholder, trustee, beneficiary, owner, general or limited partner, or similar position, in more than one application for the same channel or channels at sites within the same service area.[30] Again, if these rule changes are adopted, pending applicants would be given an opportunity to bring their applications into compliance therewith.[31] Our proposals with respect to partial settlements and interests in more than one application are consistent with those advanced in a Petition for Rule Making filed by the Wireless Cable Association, and are designed to deter the filing of speculative applications by restricting lottery entry to entities with a sincere interest in using MDS frequencies for their intended purposes. [32] In turn, with the curtailment of the number of speculative filings, which at present is believed to be prodigious, we anticipate the rate of incoming MDS applications to subside to an extent that will not overstrain our resources. We request commenters to discuss the anticipated effectiveness of the proposed measures set forth in this paragraph, and to suggest any alternative proposals for reducing the quantity of speculative MDS filings.[33]

18. **Interim Measures.** In addition to the proposed regulatory changes set forth above, which under our proposal would apply to all MDS operations, we are entertaining several interim measures to be used solely for the purpose of processing the backlog of pending MDS applications. We believe that these interim procedures are necessary in light of the exigent circumstances presented by the accumulation of several thousand applications that must be processed swiftly if the underlying objectives of this proceeding are to be realized.

19. Initially, we are imposing a short-term, temporary freeze on the filing of all applications for MDS channels, effective immediately upon adoption of this *Notice of Proposed Rule Making*. Accordingly, as of April 9, 1992, no initial applications for new stations on these channels will be accepted for filing, at least until we are able to build a complete data base.[34] The imposition of a freeze on new filings is absolutely imperative because it is the only means by which the deluge of incoming applications, which are being filed at the rate of 1000 per month, can be controlled. In addition, unless we freeze the filing of incoming applications, we will not be able to process the backlog of pending applications without seriously impinging upon our processing speeds. Finally, in any case, given the volume of pending MDS applications, we anticipate that very few newly filed applications are grantable.[35]

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the ITFS licensee would have the initial burden of going forward to demonstrate interference from an MMDS licensee. Once this initial burden has been met, the burden of disproving such interference would shift to the MMDS licensee. Commenters are requested to discuss whether these proposals suffice to provide adequate protection to ITFS operations as well as whether they are sufficiently flexible to permit MDS operators to function effectively. In addition, we specifically request commenters to discuss whether a greater number of days of continuous on-air MDS operation, such as 60, 90, or 120, should be required during which an ITFS operator may complain about co- or adjacent channel MDS interference. Finally, commenters disagreeing with any of the proposals set forth in this footnote are specifically asked to delineate suggested alternatives.

[30] *See* 47 C.F.R. § 21.902(d).

[31] *See supra* note 25.

[32] Our records make evident that speculative filings have delayed the provision of MDS service. First, numerous applicants selected for qualification review in an initial lottery have failed to perfect their applications, necessitating the initiation of new lottery proceedings. Furthermore, to date, more than 350 MDS construction permits or conditional licenses have been cancelled or forfeited for failure to construct. In addition, the sheer volume of speculative filings delays the licensing process and overburdens the Commission's resources.

[33] In addition, we are proposing to revise and strengthen the rules that prohibit the assignment or transfer of conditional MDS licenses prior to completion of construction. *See* 47 C.F.R. § 21.39(a). This action would also serve to deter speculation. Also, consistent with our existing regulations, a licensee claiming a preference in its application must operate its station for at least one year before it may assign or transfer that station. Similarly, we propose to amend 47 C.F.R. §§ 21.29 and 21.31 to prohibit substantial ownership changes in pending MDS applications. Under this proposal, any ownership change between the date of filing and the date of final action on a pending MDS application that results in more than a pro forma change of ownership would cause the application to be dismissed.

[34] The imposition of this freeze is procedural in nature and therefore is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA).*See* Kessler v. FCC, 326 F.2d 673 (D.C. Cir. 1963). Moreover, in any event, good cause exists justifying noncompliance with these APA requirements because adherence to the notice and comment and effective date requirements is impractical, unnecessary and contrary to the public interest as compliance would undercut the purposes of the freeze.

[35] This freeze is equally applicable to the amendment of pending applications except as may be permitted during the proposed fourteen-day amendment period as described in this proceeding. Any other requests for leave to amend will be considered on a case-by-case basis and will be strictly scrutinized. *See* para. 20, *infra*. The specific frequencies affected by this freeze on new filings include those identified in 47 C.F.R. § 21.901 and the ITFS frequencies available to MDS entities pursuant to 47

20. Next, to permit the expeditious processing of the backlog of MDS applications, we are considering the following special procedures to be applied to pending applications, including applications of tentative selectees, that, because they contain settlement agreements or other pre-lottery requests, would ordinarily require individualized review by Commission staff. These new rules and procedures would be prospectively applied to all pending MDS applications. Accordingly, we would permit all applicants to amend their pending applications during the fourteen-day period commencing on the effective date of the new MDS rules so that they may take the new rules into consideration or otherwise put their applications in conformity therewith. Applicants would not, however, be permitted to (1) amend the site location by moving the site in excess of 24 km (approximately 15 mi.) from the site coordinates specified in the pending application as of the day of adoption of this *Notice of Proposed Rule Making*,[36] or (2) apply for more channels than applied for in the original application. After expiration of the fourteen-day period, no further amendments to pending applications, except those required by Section 1.65 of our rules, 47 C.F.R. § 1.65, would be accepted until the processing of all backlogged applications is completed.[37] In this vein, we also wish to underscore our intention to review all waiver requests, particularly those seeking waiver of our separation standards, with strict scrutiny in accordance with 47 C.F.R. § 21.19.

21. We are also considering a proposal to bar all settlement agreements and, consequently, cumulative lottery chances, for applicants whose applications have not yet been placed on public notice designating them for random selection.[38] Under this proposal, tentative selectees resulting from settlement groups would not be required to amend their surviving application to dissolve the settlement group. In the event that any such tentative selectee's application is not granted, however, the surviving application would be dismissed. We are also considering a rule change prohibiting cumulative chances from being awarded in the case of tentative selectees who do not receive licenses and a subsequent lottery or lotteries becomes necessary. In addition, as aforementioned, we are proposing not to grant a license to any entity, including tentative selectees, with any interest whatsoever in another application or applications for the same channel in the same service area.[39] All such entities would, however, be permitted to amend their applications to divest themselves of the interest in the other application(s) in the fourteen-day period following the effective date of the new rules. Commenters are invited to discuss these proposals.

22. **Processing of Applications**. Irrespective of where MDS applications will be processed in the internal structure of the Commission, we are considering the following proposed processing procedures which we believe could help to expedite the processing of MDS applications. Under the first processing proposal, our initial step would be to create a consolidated data base comprised of all pending MDS, ITFS and H-channel applications, as well as all existing MDS, ITFS and H-channel stations, and ITFS registered receive sites, the MDS portion of which would be put out for public comment. Any entity that is either incorrectly reflected on or omitted from this data base would be afforded a limited opportunity to demonstrate that it should have been included.[40] After the data base is updated, we would process and act on all pending applications that are not mutually exclusive. We would at this time also grant licenses to all tentative selectees, selected prior to the effective date of the new rules, found to be qualified under our new standards.[41] Applications of tentative selectees that fail to qualify under the new rules would be dismissed.

23. We would then conduct lotteries to select among pending applications for both channel 1 and channel 2 that are in a condition acceptable for filing.[42] In the case of single channel applications that have already been

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C.F.R. § 74.990. The Commission will continue to accept applications to modify facilities from existing MDS/MMDS conditional licensees and licensees, as well as applications from entities eligible for the ITFS radio service.

[36] The 24 km limit should be sufficient to permit applicants to comply with any new rules adopted as the result of this proceeding.

[37] Permissible amendments made during the fourteen-day period following the effective date of the new rules would not be treated as substantial amendments under 47 C.F.R. §§ 1.918(b) and 21.23(c). Accordingly, applicants who amend their applications as provided within the fourteen-day period would retain their original filing date for this limited purpose. For administrative convenience, we would require the amending party to include with its amendment a copy of its original application as well as any previous amendments.

[38] This is a departure from existing practices under 47 C.F.R. § 21.33(b), pursuant to which, after filing, mutually exclusive individually filed MDS applicants may enter into settlement agreements giving the joint venture cumulative lottery chances.

[39] *See supra* para. 17.

[40] Such an entity may demonstrate that its license or application should be included in the data base by submitting persuasive evidence that the license was issued or the application was filed, including, for example, a copy of its license, a Commission date stamped copy of the application, a United States Postal Service certified mail receipt or a cancelled check demonstrating payment of an application fee. Mere certification of filing will not be accepted.

[41] As explained in paragraph 20, *supra*, all applicants will have been afforded an opportunity to amend their applications in order to take the new rules into account. Tentative selectees selected prior to the effective date of the new rules who are the result of settlement groups would not be required to dissolve their settlement group. *See* para. 21, *supra*.

[42] Although we initially decided to use comparative hearings to select among this group of MDS applicants, we have carefully weighed the various public interest objectives served by continuing to process Channel 1 and 2 applications through comparative hearings against the interests promoted by the use of random selection procedures, and propose to use the latter. The most important considerations leading to this proposal are (1) the efficiencies generally associated with random selection procedures as opposed to comparative processes, and (2) the necessity of proceeding to expeditious grant of the Channel 1 and 2 MDS authorizations. *See generally* Second Report and Order, Gen Docket No. 80-112, 50 Fed. Reg. 5983 (Feb. 1, 1985) (the public interest in expedited introduction of service found to require use of random selection procedures rather than comparative hearings for selecting among MMDS applications). *See also* In re Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings, CC Docket No. 83-1096, 98 FCC 2d 175, 186 (1984)(same in cellular context), *modified*, 101 FCC 2d 577, *further modified*, 59 RR 2d 407 (1985), *aff'd in part and rev'd in part*, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987). We recognize that certain applications that would be

placed on public notice, we would conduct lotteries based on the determinations of mutual exclusivity made pursuant to 47 C.F.R. §§ 21.31 and 21.914 prior to the adoption date of this *Notice of Proposed Rule Making*. These applicants would, prior to lottery, be permitted to amend their applications for the sole purpose of stating the preferences, if any, to which they believe they are entitled. We would treat applicants for channels 1 and 2 whose applications have not been placed on public notice in a manner identical to all other MDS applicants. Any such applicants seeking to claim a preference would be required to do so during the fourteen-day amendment period. After the effective date of the new MDS rules, we would issue public notices designating these applications for random selection.[43] Using a computer-based random number generator, we would then "rank order" the applications.[44] Then, we would process the applications, granting only those that satisfy the co- and adjacent channel separation requirements as to previously granted applications.

24. We would then commence processing pending MMDS applications filed during the 1983 one-day filing window. The applications of those applicants that were not previously chosen as tentative selectees would be included in lotteries to be conducted in a manner similar to that described in the preceding paragraph. We would then process the applications, granting only those that satisfy the co- and adjacent channel separation requirements as to previously granted MMDS applications and ITFS operations.

25. Finally, we would proceed to those applications filed from April 20, 1988, to the date of adoption of this *Notice of Proposed Rule Making*. The processing of these applications would be conducted in a manner identical to that proposed herein for the processing of the 1983 applications, except for (1) the treatment of previously-chosen tentative selectees within the group,[45] and (2) inclusion of applications for the H-channels. All future applications would also be processed in accordance with these general procedures.[46]

26. In addition to the above proposals, we seek comment on the following variation for the processing of MDS applications. Specifically, we propose as another alternative that licensees be selected by lotteries held for service areas defined by Metropolitan Statistical Area (MSA) or Rural Service Area (RSA) boundaries, similar to current practices in the Cellular Radio Service.[47] Pursuant to this proposal, each application would be associated with an MSA or an RSA. Any existing tentative selectees would be processed first to determine which MSAs or RSAs are closed and which have frequencies remaining. We propose that these tentative selectees would be awarded their requested frequencies for the entire MSA or RSA in which the selectee's transmitter site is to be located.[48] In the event that more than one tentative selectee for the same frequency or frequencies exists within an MSA or RSA, we request comment on whether the MSA or RSA should in some fashion be divided between the tentative selectees, whether the mutually exclusive tentative selectees should be given an opportunity to negotiate among themselves to build one joint or multiple separate MDS stations within the service areas, or whether the Commission should conduct a second lottery among the tentative selectees, the winner of which would be awarded a license for the entire MSA or RSA.

27. After existing tentative selectees are processed, all remaining applicants would, as noted, be associated with an MSA or RSA. Lotteries among mutually exclusive applicants would then be held for open MSAs and RSAs based on MSA/RSA numerical ranking, i.e., with MSAs for which the largest number of MDS applications are filed first. Selectees would be granted the frequencies they requested in their applications to the extent that they are not already assigned within the MSA or RSA.[49] We seek

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included in the lottery may already have been designated for hearing and a hearing fee submitted. We believe, however, that it would be appropriate and within our authority to process these applications via random selection. In those instances where the hearing fee was not paid in a timely manner, the MDS application would be dismissed and would not be eligible for lottery.

[43] We would accept petitions to deny filed within thirty days of the issuance of this public notice. We would also accept petitions to deny filed against MDS applicants that are not mutually exclusive within thirty days of the issuance of a public notice listing such applications. 47 C.F.R. § 1.962(g). We propose that there would no longer be separate ITFS petitions to deny or a separate period of time for ITFS entities to file petitions to deny in all future MDS processing. *Cf.* 47 C.F.R. § 21.902.

[44] In determining the winners, we would retain the use of diversity and minority preferences. *See* Second Report and Order, Gen Docket No. 80-112, 50 Fed. Reg. 5983 (February 1, 1985). In addition, we would continue to enforce the equal employment opportunity program as set forth in 47 C.F.R. § 21.307. At this juncture, we also note our intent to treat the falsification of an entitlement to a preference as an abuse of our processes and a reflection on an applicant's basic qualifications for licensing. Also, any such cases of falsification would be submitted to the United States Attorney for prosecution under 18 U.S.C. § 1001.

[45] We would include in the lottery of these filings the applications of existing tentative selectees that have not yet been dismissed, denied or issued a conditional license if we determine that their selection was procedurally defective. We find it necessary to preserve the option of rescinding tentative selectee status because we have substantial reason to believe that some of the lotteries resulting in the selection of applicants from this filing group were procedurally defective. Several post-1988 lotteries were conducted while applications filed many years earlier that could have been mutually exclusive remained pending. In these circumstances, we believe that the only available avenue for correcting these procedural defects would be to begin anew with respect to all applicants who have not been awarded a conditional license. Interested parties are invited to comment on this proposal.

[46] If the burden of conducting multiple lotteries is too great to allow service to be provided to the public in a timely manner, we may find it necessary to conduct fewer lotteries and to adopt rules to utilize groups of mutually exclusive applicants that are larger than those contemplated by Section 21.914 of our rules, 47 C.F.R. § 21.914. Commenters are requested to address the desirability of this option.

[47] *See generally* 47 C.F.R. § 22.903.

[48] The licensee would not, however, be permitted to provide service beyond the boundaries of its MSA or RSA. Prior to grant of its license, the tentative selectee would be afforded an opportunity to amend its application to change its transmitter site to another location within the MSA or RSA if it desired.

[49] We propose that the tentative selectee would be awarded the frequencies requested in its application throughout the entire MSA or RSA, but that it must protect, in accordance with the rules we adopt as the result of this proceeding, the operations of

comment with respect to whether a selectee should be granted all remaining MDS frequencies in the MSA or RSA without regard to the frequencies originally requested. Selectees would then have an opportunity to amend their transmitter sites to comply with either the mileage separations or desired-to-undesired signal ratios, as appropriate, depending on the outcome of this rule making. Sites with short-spacing agreements with licensees of adjacent MSA/RSA transmitter sites would also be accepted. For administrative convenience, we propose to require the selectees to submit, upon request by the Commission, an additional copy of their application and any amendments thereto.

28. This proposal would allow considerable flexibility for licensees and would help to guarantee the ability of a licensee to serve an entire market. It would also allow "engineering-in" of transmitter sites. We seek comment on whether we should require a specific build-out of an MSA or RSA based on land area or population and whether unserved areas should be subject to new applications at some point in the future.

29. We solicit comment on all aspects of our proposals for the processing of pending and future MDS applications. We also ask commenters to set forth any alternative suggestions and all recommendations that in their view would prove more efficacious in terms of either easing the burden on applicants or the Commission, or in accomplishing the goals of this proceeding in general. In addition, we wish to underscore our cognizance of the fact that several of the proposals advanced in this proceeding represent significant departures from previous rules and practices governing the selection and operation of MDS licensees. As such, we propose to refund the application filing fees paid by any applicant who, in light of the changes proposed herein, requests dismissal of its application prior to the issuance of the public notice designating the application for random selection.[50] In this same vein, we request commenters' views as to whether, in light of the complicated task before us in undertaking to process thousands of applications and conducting separate lotteries, it would simply be preferable to return all pending applications and establish a new window for acceptance of MDS applications.

IV. CONCLUSION

30. In conclusion, as the market for the distribution of video entertainment material becomes increasingly dominated by cable television systems, it is incumbent upon us to create a regulatory environment amenable to the competitive viability of rival operators. We are initiating this proceeding in an attempt to facilitate the emergence of wireless cable as a vital competitor to traditional coaxial cable systems. The various rules and procedures proposed in this proceeding are designed to restructure our regulatory scheme and processing procedures in a manner that will foster the growth and development of wireless cable by making MDS frequencies readily available for use by wireless cable operators. This in turn will benefit the public interest by expediting the provision of wireless cable service, thereby enhancing competition in the video distribution marketplace.

V. PROCEDURAL MATTERS

Ex parte Rules - Non-Restricted Proceeding

31. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

Initial Regulatory Flexibility Analysis

32. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals advanced in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this *Notice*, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. The Secretary shall send a copy of this *Notice of Proposed Rule Making*, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Comment Dates

33. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before June 29, 1992, and reply comments on or before July 14, 1992. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you wish for each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

34. For further information concerning this proceeding, contact Karen Kincaid or Rosalind Allen, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

35. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j) and 303(r).

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all previously granted licensees. The service area of these MSA- or RSA-wide licensees could not extend beyond the border of the MSA or RSA.

[50] We interpret 47 C.F.R. § 1.1111(a)(4) to permit us to refund application fees paid by such entities.

36. Accordingly, IT IS ORDERED, upon the adoption of this Notice of Proposed Rulemaking, that no new applications for the MDS or MMDS service will be accepted for filing by the Federal Communications Commission until further notice by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for Action

This rule making proceeding is being initiated to obtain comment regarding a proposal to modify the existing rules and policies pertaining to applicants, conditional licensees and licensees in the Multipoint Distribution Service.

Objectives

The purpose of this rule making is two-fold: (1) to expedite the provision of the various services offered on MDS frequencies to the public, and (2) to increase administrative efficiency in the processing of MDS applications.

Legal Basis

The proposed action is authorized under sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S. C §§ 154(i), 154(j), and 303(r).

Reporting, Recordkeeping and Other Compliance Requirements

Generally, the proposed rule changes reduce the reporting and recordkeeping burden on applicants. The amendment of certain applications may, however, be necessitated in order for applicants to bring their applications into compliance with the new rules.

Federal Rules that Overlap, Duplicate or Conflict with these Rules

None.

Description, Potential Impact, and Number of Small Entities Involved

The rule changes proposed in this proceeding could affect certain small entities in the wireless cable industry, or small entities that otherwise use MDS spectrum. After evaluating the comments, the Commission will further examine the impact of any rule changes on small entities and set forth our findings in the Final Regulatory Flexibility Analysis.

Any Significant Alternatives Minimizing the Impact on Small Entities Consistent with the Stated Objectives

None.

APPENDIX B

Parts 1, 2, and 21 of Title 47 of the U.S. Code of Federal Regulations are amended to read as follows:

1. The Authority Citation for Part 1 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. The heading for Section 1.824 is changed to read "Random selection procedures for Multipoint Distribution Service." and Section 1.824 is amended to read as follows:

§ 1.824 Random selection procedures for Multipoint Distribution Service.

(a) If there are mutually exclusive applications for an initial conditional license the Commission may use the random selection process to select the conditional licensee. Each such random selection shall be conducted under the direction of the Office of the Managing Director in conjunction with the Office of the Secretary. Following the random selection, the Commission shall announce the tentative selectees and dismiss all applications that are not tentative selectees. The Commission shall determine whether tentative selectees are qualified to receive the conditional license and if the Commission determines that a tentative selectee is qualified, it shall grant an application. If the Commission determines that a tentative selectee for a particular assignment is not qualified to receive a grant of its application, the station assignment of that tentative selectee will *not* be awarded from among the pool of applications from that random selection.

(b) Competing applications for conditional licenses shall be designated for random selection in accordance with the procedures set forth in §§ 1.1621, 1.1622(a), (b), (c), and (d), and 1.1623. No preferences pursuant to § 1.1622(b)(2) or (b)(3) shall be granted to any MDS applicant whose owners, when aggregated, have an ownership interest of more than 50 percent in the media of mass communication whose service areas, as set forth in § 1.1622(e)(1) through (7), wholly encompass or are encompassed by the service area, computed in accordance with § 21.902(e), for which the conditional license is sought.

(c) Petitions to Deny filed against an application must be filed within 30 days of the Public Notice announcing that the application is accepted for filing. Any consolidated reply to the Petition to Deny must be filed within 15 days of the due date for filing the Petition to Deny. The Commission shall review and process *only* Petitions to Deny filed against applicants later deemed to be tentative selectees.

3. The Authority Citation for Part 2 continues to read as follows:

AUTHORITY: Secs 4, 302, 303, 307, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 302, 303, 307, unless otherwise noted.

4. Section 2.106 is revised by replacing note NG47 to read as follows:

§ 2.106 Table of frequency allocations.

NG47 In Alaska, frequencies within the band 2655-2690 MHz are not available for assignment to terrestrial stations.

5. Section 2.106 is revised by deleting note NG47 from column 5 in frequency band 2500-2655 MHz, and by including "AUXILIARY BROADCASTING (74)" and "DOMESTIC PUBLIC FIXED RADIO (21)" under column 6 in frequency band 2500-2655 MHz.

6. The Authority Citation for Part 21 continues to read as follows:

AUTHORITY: Secs 1, 2, 4, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 410, 602; 48 Stat. 1064, 1066, 1070-1073, 1076, 1077, 1080, 1082, 1083, 1087, 1094, 1098, 1102, as amended; 47 U.S.C. 151, 154, 201-205, 208, 215, 218, 303, 307, 313, 314, 403, 404, 602; 47 U.S.C. 552.

7. Section 21.13(a)(2) is amended to read as follows:

§ 21.13 General application requirements.

(a)* * *

(2) Demonstrate, or, in the case of MDS applicants, certify, the applicant's legal, financial, technical and other qualifications to be a conditional licensee or licensee;

8. Section 21.15(a) is amended by adding a new sentence at the end of the subsection to read as follows:

§ 21.15 Technical content of applications.

* * * * *

(a) * * * Provided, MDS applicants proposing a new station location shall certify, rather than demonstrate, availability of the proposed station site.

9. Section 21.20(b)(5) is amended and Section 21.20(b)(11) is added to read as follows:

§ 21.20 Defective applications.

* * * * *

(b)* * *

(5) The Multipoint Distribution Service application does not certify the availability of the proposed site for the new facility or the application in the Point-to-Point Microwave Radio, Local Television Transmission, or Digital Electronic Message Services does not demonstrate the availability of the proposed site for the new facility;

* * * * *

(11) The Multipoint Distribution Service application specifies a transmitter site within 80 km (approximately 50 mi) of an existing or previously applied-for co-channel station or within 48 km (approximately 30 mi) of an existing or previously applied-for adjacent channel station.

10. Sections 21.23(a) and (b) are amended to read as follows:

§ 21.23 Amendment of applications.

(a) Any pending application may be amended as a matter of right if the application has not been designated for hearing or for comparative evaluation pursuant to § 21.35, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications. An MDS application tentatively selected by the random selection process may be amended as a matter of right up to 14 days after the date of the public notice announcing the tentative selection, provided, however, that the amendments shall comply with the provisions of § 21.29 as appropriate and the Commission has not otherwise forbidden the amendment of pending applications. Provided further, that the Commission will not grant applications that seek more than a pro forma change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

(b) The Commission or the presiding officer may grant requests to amend an application designated for hearing or for comparative evaluation, or tentatively selected by the random selection process, only if a written petition demonstrating good cause is submitted and properly served upon the parties of record, except that MDS applications tentatively selected in a random selection process may be amended as a matter of right under paragraph (a) of this section. Provided, however, that the Commission will not grant applications that seek more than a pro forma change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

11. Section 21.28 is amended by adding the following new subsection (f) at the end of the existing text:

§ 21.28 Dismissal and return of applications

* * * * *

(f) The Commission will dismiss a Multipoint Distribution Service application if the applicant seeks to change ownership or control, except for a pro forma change of ownership or control.

12. Section 21.29 is amended by adding the following new subsection (f) at the end of the existing text:

§ 21.29 Ownership changes and agreements to amend or to dismiss applications or pleadings.

* * * * *

(f) Notwithstanding the provisions of Section 21.29(e) of this part, the Commission will not grant applications that seek more than a *pro forma* change of ownership or control of a pending MDS application and the Commission will dismiss any MDS application seeking such a change of ownership or control.

13. Section 21.30 is amended by revising subsection (a)(4) to read as follows:

§ 21.30 Opposition to applications.

* * * * *

(a)* * *

(4) Be filed within thirty (30) days after the date of public notice announcing the acceptance for filing of any such application or major amendment thereto; and

* * * * *

14. Section 21.33 is amended to read as follows:

§ 21.33 Grants by random selection.

(a) If an application for a license in the Digital Electronic Message Service (DEMS) is mutually exclusive with another such application and satisfies the requirements of § 21.31, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.825.

(b) If an application for a license in the Multipoint Distribution Service (MDS) is mutually exclusive with another such application and satisfies the applicable requirements of §§ 21.31 and 21.914, the applicants may be included in the random selection process set forth in Part 1, §§ 1.821, 1.822, and 1.824.

(c) Renewal applications shall not be included in the random selection process.

(d) If, after filing individual MDS applications, mutually exclusive applicants enter into settlements that result in the formation of a joint venture, the joint venture must be represented by one application only and will not receive the cumulative number of chances in the random selection process that the individual applicants would have had if no settlement had been reached; the joint venture will be entitled to only one chance in the random selection process.

16. In Section 21.39, subsections (b) and (c) are redesignated subsections (c) and (d), respectively; subsection (a) is modified and relabeled subsection (b), and a new subsection (a) is added to Section 21.39 to read as follows:

§ 21.39 Considerations involving transfer or assignment applications.

(a) A conditional license to operate an MDS station authorized under this part may not be assigned or transferred prior to the completion of construction of the facility. However, the Commission may give its consent to the assignment or transfer of control of such a conditional license prior to the completion of construction and placing the facility into operation where:

(1) The assignment or transfer does not involve a substantial change in ownership or control of the authorized radio facilities; or,

(2) The assignment or transfer is involuntary due to the licensee's bankruptcy, death, or legal disability.

(b) The Commission will review proposed transactions under this part to determine if the circumstances indicate "trafficking" in licenses whenever applications (except those involving *pro forma* assignment or transfer of control) for consent to assignment of a license, or for transfer of control of a license, involve facilities that were:

* * * * *

17. The table in Section 21.107 of the rules, and footnote 1 to that table, is amended as follows:

Frequency band (MHz)	Maximum allowable transmitter power		Maximum allowable EIRP	
	Fixed (W)	Mobile (W)	Fixed (dBW)	Mobile (dBW)
* * *				
2150 to 2160	.....	.....	33	.....
2160 to 2180	20	.....	[1]	.....
2500 to 2686	.....	.....	33	.....

* * * * *

[1] For Multipoint Distribution Service at 2160-2162 MHz, EIRP up to 33 dBW may be authorized pursuant to § 21.904 of this part.

18. Section 21.900 is amended to read as follows:

§ 21.900 Eligibility.

Authorizations for stations in this service will be granted to existing and proposed communications common carriers and non-common carriers. Applications will be granted only in cases where the applicant certifies that:

* * * * *

(c) * * *

The applicant shall submit a statement indicating whether service will be provided on a common carrier or a non-common carrier basis. In addition, a common carrier applicant shall submit a statement indicating whether there is any affiliation or relationship to any intended or likely subscriber or program originator. Any applicant for a Multipoint Distribution Service station desiring a preference in the random selection process, in accordance with the procedures set forth in § 1.824, must so indicate as part of its application.

19. Section 21.901(d) is amended to read as follows:

§ 21.901 Frequencies.

* * * * *

(d) Multipoint Distribution Service frequencies in the 2150-2162 MHz and 2596-2680 MHz bands and associated response channels will be assigned only in accordance with the following conditions:

(1) A Multipoint Distribution Service applicant may file only one application per station per channel or channel group within one service area as determined in accordance with § 21.902(e). The stockholders, the

partners, the owners, the trustees, the beneficiaries, the officers, the directors, or any other person or entity holding any interest in one application for a particular channel or channel group in a particular service area, directly or indirectly, must not have any interest, directly or indirectly, in another application on the same channel or channel group within the same service area.

(2) All applicants for frequencies in these bands must specify the channel or channels being applied for; however, the Commission may on its own initiative assign different channels in the band if it is determined that such action would serve the public interest.

(3) Licensees or conditional licensees of the frequencies in the 2596-2644 MHz band may petition the Commission to authorize exchange of assigned channels to allow adjacent channel operation. For example, one licensee may be assigned channels E1, F1, E2 and F2 and the other licensee could be assigned channels E3, F3, E4 and F4. Such a petition will be granted if the petitioners show that the exchange will result in better service to the public.

(4) Except as noted in Section (d)(6) of this subpart, each applicant filing an MDS application for frequencies in these bands must certify that its transmitters are located a minimum of 80 km (approximately 50 mi) from all authorized or previously applied-for co-channel ITFS or MDS transmitters' coordinates in the 2150-2162 or 2596-2680 MHz bands, except for signal booster transmitter sites.

(5) Each applicant filing an MDS application for frequencies in these bands must certify that its transmitter's coordinates are either located at the same coordinates or at a minimum of 48 km (approximately 30 mi) from all authorized or previously applied-for adjacent channel ITFS or MDS transmitters' coordinates in the 2150-2162 or 2590-2686 MHz bands except for signal booster transmitter sites.

(6) Applicants filing applications for frequencies in these bands may locate their Multipoint Distribution Service station transmitters less than 80 km (approximately 50 mi) from all authorized or previously applied-for co-channel ITFS or MDS station transmitters in the 2150-2162 or 2596-2680 MHz bands, if the applicant's proposed MDS station is cross-polarized, specifies equal EIRP, and the conditions described in Table 1 below are met.

TABLE 1 - MINIMUM CO-CHANNEL SEPARATION DISTANCE (kilometers)

Existing Station HAAT (meters)

Proposed Station HAAT (meters)	180	165	150	135	120	105	90	75	60	45	30	15
180											79	72
165											76	69
150										79	74	68
135										76	71	64
120									77	74	68	61
105								79	74	71	66	58
90							79	76	71	68	63	55
75						79	76	72	68	64	60	52
60					77	74	71	68	64	60	55	48
45			79	76	74	71	68	64	60	56	50	44
30	79	76	74	71	68	66	63	60	56	50	45	39
15	72	69	68	64	61	58	55	52	48	44	39	32

20. Section 21.901(f) is removed.

21. The Section heading of Section 21.902 is changed to read "Frequency assignment and use criteria."

22. Section 21.902(b) is amended to read as follows:

§ 21.902 Frequency assignment and use criteria.

* * * * *

(b) As a condition for licensing of frequencies in this service, each Multipoint Distribution Service applicant is required to:

(1) Locate its MDS station transmitter's coordinates at least 80 km (approximately 50 mi) from the coordinates of transmitters of all other authorized or previously applied-for co-channel stations in this service, except signal booster transmitters.

(2) Locate its MDS station transmitter's coordinates at least 80 km (approximately 50 mi) from the transmitters of all other licensed, with-construction permit or previously applied-for co-channel stations in the Instructional Television Fixed Television Service (ITFS), except signal booster transmitters.

(3) Locate its MDS station transmitter's coordinates either at the same coordinates or at least 48 km (approximately 30 mi) from the transmitters' coordinates of all other authorized or previously applied-for adjacent channel stations in this service, except signal booster transmitters.

(4) Locate its MDS station transmitter's coordinates either at the same coordinates or at least 48 km (approximately 30 mi) from the transmitters' coordinates of all other licensed, with-construction permit or previously applied-for adjacent channel stations in the Instructional Television Fixed Service (ITFS) operating on D, E, F, or G-channels, except signal booster transmitters.

(5) As an alternative to satisfying the requirements set forth in subsections (b)(2) and (b)(4) of this section, an applicant for an MDS station may submit a statement from affected MDS or ITFS applicants, licensees or construction permittees stating that such licensees or construction permittees, or applicants do not object to operation of the proposed MDS station.

23. Section 21.902(c), (d), (e), (f), (g), (h), (i), (j) and (k) are removed and new Sections 21.902(c), (d), and (e) are amended to read as follows:

§ 21.902 Frequency assignment and use criteria.

(c) As a condition for use of frequencies in this service, each applicant, conditional licensee and licensee is required to:

(1) Not enter into any lease or contract or otherwise take any action that would unreasonably prohibit location of another station's transmitting antenna at any given site;

(2) Cooperate fully and in good faith to resolve interference and transmission security problems;

(3) Protect 1) all co-channel registered ITFS receive sites in existence at the time an MDS station is conditionally licensed, in accordance with the 45 dB protection ratio referenced in § 74.903(a)(1) and (3); and 2) all adjacent channel registered ITFS receive sites in existence at the time an MDS station is conditionally licensed, in accordance with the 0 dB protection ratio (or 10 dB, where applicable) referenced in § 74.903(a)(2) and (3);

(i) At least 14 calendar days prior to commencement of operation, an MDS licensee is required to contact any co-channel or adjacent channel ITFS licensee within 112 km (approximately 70 mi) or 80 km (approximately 50 mi), respectively, of the MDS transmitter site and notify the ITFS licensee by certified mail, return receipt requested, of the exact date and time that MDS operation is to begin and of the MDS licensee's expected hours of operation.

(ii) If no interference as defined in § 74.903(a) occurs to the ITFS system, or if the ITFS licensee fails to complain, the MDS license becomes unconditional with respect to the need to protect ITFS adjacent or co-channel licensees after 30 days of continuous on-air operation. During this 30-day period, the MDS licensee must make every effort to ensure that the ITFS licensee is aware of the MDS licensee's actual hours of operation.

(iii) Should interference to co-channel or adjacent channel ITFS licensees occur, the Commission may, either at the request of an ITFS licensee or on its own motion, order the MDS licensee to cease operation immediately without hearing.

(iv) Prior to resuming normal operations, an MDS licensee that has ceased operation pursuant to subsection (3)(iii) of this section must reduce harmful interference to the levels required in § 74.903(a). Such reduction may be accomplished by any mutually acceptable means, including, but not limited to, reduction of MDS transmitter power, use of a directional antenna at the MDS transmitter site, provision at no cost to the ITFS operator by the MDS licensee of an improved antenna for ITFS receive sites, or any combination thereof. The MDS licensee may not resume operations until it complies with this subsection.

(v) The ITFS licensee must cooperate with the MDS licensee's efforts to comply with subsection (iv) above. Failure to cooperate fully will result in the ITFS licensee receiving protection from harmful interference based only upon use of the reference receive antenna described in § 74.903(a)(3). Failure to cooperate will also result in loss by the ITFS licensee of its right to request immediate cessation of the MDS licensee's operations in

accordance with subsection (iii) above.

(d) The following analyses, as appropriate, must be included with each application:

(1) In the case of a proposal for use of channel 2, an analysis of the potential for harmful interference with any authorized point-to-point station located within 80 km (approximately 50 mi) which utilizes the 2160-2162 MHz band, and

(2) An analysis concerning possible adverse impact upon Mexican or Canadian communications if the station's transmitting antenna is to be located within 80 km (approximately 50 mi) of the border of either Mexico or Canada.

(e) For purposes of calculating the service area of an MDS station to determine 1) the MDS licensee's eligibility for a preference in accordance with § 1.1622(e) and 2) the MDS licensee's eligibility to file for an MDS conditional license in accordance with § 21.901(d):

(1) For a station using a transmitting antenna with an omnidirectional horizontal plane radiation pattern the boundary of the service area will be 24 km (15 mi) from the transmitter site.

(2) For a station using a transmitting antenna with a non-omnidirectional horizontal plane radiation pattern the boundary of the service area will be the locus of all points located at distances from the transmitter as determined by the following equation:

$$Db = \frac{Db_{max}}{\text{antilog}\left(\frac{G_{max} - G}{20}\right)}$$

in which the parameters are defined as follows:

Db = the distance from the transmitter site to the boundary in the direction of interest

G = the transmitter antenna gain in the direction of interest

G_{max} = the maximum antenna gain

Db_{max} = the distance to boundary, in the direction of maximum gain that will make the total area within the boundary of the service area equal to or less than 1,838 sq. km. (710 sq. mi.)

All distances are in kilometers, the gains are in dB and are relative to an isotropic antenna, and the antilog is taken to the base 10.

24. Section 21.904(c) is amended to read as follows:

(c) An increase in station transmitter power, above currently authorized or previously authorized values, to the maximum values provided in paragraphs (a) and (b) of this section, may be authorized, if an applicant demonstrates that the requested power increase will not cause harmful interference to any authorized or previously-proposed co-channel or adjacent-channel ITFS station in accordance with § 21.902(c)(3), or if an applicant demonstrates that:

* * * * *

25. Section 21.910(a)(4) is amended to read as follows:

§ 21.910 Special procedures for discontinuance, reduction, or impairment of service by common carrier MDS licensees.

(a)(4) Whether single-channel or multi[-]channel Multipoint Distribution Service is affected; and

* * * * *

26. The phrase "protected service area" is changed to read "service area" in Sections 21.912(a), 912(b), 912(c), 912(d)(1), 913(a), 913(b), 913(c), 913(g), 913(g)(8), and 913(g)(9).

27. The term "MMDS" is deleted from Sections 913(g), 913(g)(6), 913(g)(8), and 913(g)(11).

28. Section 21.914 is amended to read as follows:

§ 21.914 Mutually exclusive applications.

Notwithstanding the provisions of §21.31(b)(2)(i) and (ii), to be entitled to be included in a random selection process with one or more conflicting applications, an application for frequencies at 2150-2162 MHz, 2596-2644 MHz, 2650-2656 MHz, 2662-2668 MHz, or 2674-2680 MHz must be received by the Commission in a condition acceptable for filing on the same calendar day as the first of the conflicting applications is received by the Commission in a condition acceptable for filing.

SEPARATE STATEMENT OF
Commissioner James H. Quello

Re: Amendment of Parts 1, 2, and 21 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands

I generally support the Notice of Proposed Rulemaking, but wish to direct the attention of commenters to two areas of concern. In particular, I am concerned with footnote 29 in the Notice which indicates that ITFS registered receive sites would be given "actual protection in accordance with 47 C.F.R. Section 74.903(a)(2)." This section of the Rules, however, refers to predicted protection, not actual protection, and the footnote may be misleading to ITFS licensees. As proposed in the Notice, if an ITFS licensee does not complain of interference to its registered receive site from an MDS transmitter within a certain period of time, the protection afforded these sites under 74.903(a)(2) would be withdrawn. This is in marked contrast to the continuing protection of registered receive sites under Section 74.903 afforded ITFS licensees against other ITFS licensees. ITFS licensees and permittees should pay particular attention to this proposal in their comments.

I am also concerned that the short-spacing table (Appendix B, Table 1) may undermine the assumptions now used in processing applications for ITFS frequency use. The Commission now relies upon a fixed 50-mile transmitter-to-transmitter separation standard to determine when receive site protection showings must be submitted. I am not as confident that receive site showings may be safely dispensed with under a short spacing scheme. Again, I urge commenters to address this matter.

SEPARATE STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

Amendment of Parts 1, 2, 21 and 74 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands

Ever since I attended the Wireless Cable Association convention last summer in Denver and heard so much about the problem, helping unsnarl the red tape hampering the wireless cable industry has been a concern of my office. My interest in smoothing and speeding the process is twofold: to encourage competition in the video marketplace and to improve the FCC's service to the public.

Last fall, I issued a separate statement on two items we adopted to reform our wireless cable rates. I pointed out that "there is much more that the FCC must do, beyond the scope of these rulemakings, to encourage the expansion of both wireless cable and ITFS operators. Now that we have addressed the legal and technical standards issues affecting these services, we need to tackle the equally difficult job of expediting our processing of MMDS and ITFS applications and establishing a speedy, 'one-stop shopping' mechanism to enable *all* new entrants to enhance competition in the communications marketplace."

In early February, I sent a memo to Chairman Sikes urging once again that the Commission adopt a "one-stop shopping" approach to reduce the problems faced by wireless cable operators in assembling channels and to help them bring their services to the public more expeditiously. Doing so, I argued, would demonstrate our commitment to the President's pro-competitive goals of streamlining the regulatory process and removing obstacles that are blocking industrial innovation and growth. Chairman Sikes has taken a personal interest in this matter and has devoted key staff resources to bringing this agenda item forward so quickly.

I am gratified that we are acting today to eliminate the processing backlog and to put unscrupulous application mills out of business. I have great confidence in the ability of Ralph Haller, Chief of the Private Radio Bureau, and his efficient Gettysburg operation. I hope they will create a workable computer database and plow through the backlog, which includes pending applications from 1983 and is a growing embarrassment to the Commission.

I do not want the Commission to err, on the other hand, by doing too much, too fast. I am particularly wary of changing our current interference standards to a mileage separation approach. While such a standard may expedite processing, it may deny wireless operators the flexibility they need to deliver their services in some communities, since it appears to presuppose that all U.S. communities are equally spaced at 50-mile intervals. I am also concerned that, given the large number of changes we are proposing today, we may not have considered fully the net aggregate effect of all of these reforms on the industry. So we should beware of the unforeseen dangers of replacing a horse-and-carriage process with a speeding bullet train.

I will review the comments filed in this proceeding with great interest, especially any concerns raised by wireless cable operators, by ITFS operators, by their trade associations, and by the communications bar. My interest in this proceeding is to ensure that the *public* interest in competitive video delivery is adequately considered and supported.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-86

In re Applications of

WILLIAM F. PEEL, JR.	File No. BPH-890906MM
MINORITY BROADCASTING GROUP LIMITED	File No. BPH-890914MT
KAREN M. LOWERY	File No. BPH-890914MU
SEA OAKS BROADCASTING	File No. BPH-890914ND
CRYSTAL COMMUNICATIONS, INC.	File No. BPH-890914NF
WHITE CITY BROADCASTING, INC.	File No. BPH-890914NP
HEATHER WILLSON CASS	File No. BPH-890914NW
MIDWAY BROADCASTING COMPANY	File No. BPH-890914OD

For Construction Permit for a
New FM Station on Channel 284A
in White City, Florida

Appearances

Lauren A. Colby and *Deborah S. Colby* on behalf of William F. Peel, Jr.; *Nora E. Garrote* and *Thomas A. Hart, Jr.* on behalf of Minority Broadcasting Group Limited; *Jerrold Miller* on behalf of Karen M. Lowery; *Denise B. Moline* on behalf of Sea Oaks Broadcasting; *Howard M. Weiss* and *Christopher Holt* on behalf of Crystal Communications, Inc.; *Lewis J. Cohen* and *John J. Schauble* on behalf of White City Broadcasting, Inc.; *Margot Polivy* and *Katrina Renouf* on behalf of Heather Willson Cass; *Dennis P. Corbett, Evan D. Carb*, and *Lynn M. Crakes* on behalf of Midway Broadcasting Company; and *James Shook* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: May 20, 1992; Released: May 29, 1992

TABLE OF CONTENTS

TOPICS	PARAGRAPH(S)
Introduction	
Findings	1-5
Preliminary Ruling	
Findings	6-15
Issue 1: The Standard Comparative Issue	
Description of Applicants	
Findings	16-23
William F. Peel, Jr.	
Finding	16
Sea Oaks Broadcasting	
Finding	16
Heather Willson Cass	
Finding	16
Minority Broadcasting Limited	
Findings	17-18
Crystal Communications Inc.	
Findings	19-20
White City Broadcasting, Inc.	
Finding	21
Midway Broadcasting, Inc.	
Findings	22-23
Diversification of Mass Media	
Findings	24-33
William F. Peel, Jr.	
Finding	24
Minority Broadcasting Limited	
Finding	25
Sea Oaks Broadcasting	
Finding	26
Crystal Communications Inc.	
Finding	27
White City Broadcasting, Inc.	
Findings	28-31
Heather Willson Cass	
Finding	32
Midway Broadcasting, Inc.	
Finding	33

Best Practicable Service	
Comparative Coverage	
Findings	34-37
Quantitative and Qualitative Integration	
Findings	38-210
White City Broadcasting, Inc.	
Finding	38
William F. Peel, Jr.	
Findings	40-49
Minority Broadcasting Limited	
Findings	60-92
Sea Oaks Broadcasting	
Findings	93-123
Crystal Communications Inc.	
Findings	124-151
Heather Willson Cass	
Findings	152-167
Midway Broadcasting, Inc.	
Findings	168-210
Auxiliary Power	
Finding	211
Ultimate Findings of Fact and	
Preliminary Conclusions of Law	
Conclusions	1-25
Diversification of Mass Media	
Conclusions	4-10
Best Practicable Service	
Conclusions	11-25
Criterion 1: Comparative Coverage	
Conclusion	13
Criterion 2: Quantitative Integration	
Conclusions	14-25
Ultimate Conclusions	26

1. Originally seventeen applicants filed for a new FM[1] station on Channel 284A in White City, Florida. Eight remain: (1) William F. Peel, Jr. (Peel); (2) Minority Broadcast Group Limited (Minority); (3) Karen M. Lowery (Lowery); (4) Sea Oaks Broadcasting (Sea Oaks); (5) Crystal Communications, Inc. (Crystal); (6) White City Broadcasting, Inc. (WCBI); (7) Heather Willson Cass (Cass); and (8) Midway Broadcasting Company (Midway).

2. After the interlocutory cycle had run its course, we took evidence on the standard comparative issue and the ultimate issue:[2]

(1) To determine which of the proposals would, on a comparative basis, best serve the public interest; and

(2) To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. In addition, The Chief, Audio Services called for comparative coverage evidence to be taken under the standard comparative issue. *See* 56 F.R. 22430 *supra*. at para. 9.[3]

4. We held a prehearing conference on August 13, 1991, and an Evidentiary Admission Session on August 28, 1991. We held our hearings on September 10-11, 16-20, and 23, 1991. The evidentiary record was closed September 26, 1991 (FCC 91M-2943).

5. All eight applicants, along with the Mass Media Bureau, filed their Proposed Findings of Fact and Conclusions of Law on November 18, 1991.[4] Peel, Minority, Sea Oaks, Crystal, Cass and Midway filed Reply Findings on December 3, 1991. WCBI and Karen Lowery did not.

Preliminary Ruling

Dismissal of Karen M. Lowery's Application

6. Karen M. Lowery's application (BPH-890914MU) will be dismissed. She attempted to prosecute her application improperly; she misrepresented facts about her (their) applications and she deluged the record with interlocutory pleadings, pleadings apparently designed to conceal the applicant's true identity, create obscurities, and confuse her (their) mutually exclusive opponents. Consequently, the Trial Judge was forced to reject her (their) direct written exhibits: (1) because there was no identifiable applicant; (2) because those exhibits contained overt and patent misrepresentations; i.e., Lowery promised to amend her application to provide for a corporation, and then never did; and (3) because of decisional inconsistencies in those exhibits her opponents were unable to engage in both pretrial and trial preparation. Thus, Lowery inappropriately burdened the adjudicatory process and prejudiced her (their) opponents.

7. To begin with she submitted pleadings, and exhibits and papers using *five* different names. First she held herself (theirself) out as: (1) Karen M. Lowery Broadcasting; (2) then simply as Karen M. Lowery; (3) then as Karen M. Lowery d/b/a White City Radio; (4) then as Lowery Broadcasting Limited Partnerships; and (5) finally as Lowery Broadcasting Inc. By timely changing her (their) identity, she (they) were able to prevent her (their) opponents from preparing an effective and efficient testing of her application. In brief she. (they) did her (their) level best to turn this eight-party proceeding into an unfocused disaster. The Trial Judge was obliged to thwart this effort. *See* FCC 91M-2734 released September 5, 1991.

8. During the formulative phase of the case she filed four *untimely* predesignation amendments and six postdesignation amendments. In one of her postdesignation amendment petitions; i.e., the May 28, 1991 petition she didn't even address, let alone meet, the "good cause" tests laid down in *Erwin O'Conner Broadcasting Company*, 22 FCC 2d 140 (Rev. Bd 1970). *See* FCC 91M-1890 released June 13, 1991.

9. On June 10, 1991, Lowery filed a *Request for In Camera Inspection*. There she presented 15 documents for inspection without making any attempt to follow the five steps outlined in *Patterson Communications Associates*, 41 RR 2d 640 (1977) and 41 RR 2d 1072 (1977). *See* FCC 91M-2213 releaed July 18, 1991.

10. Lowery's deceit surfaced on May 29, 1991. On that day she along with three other applicants (Sage, Idas, and White City Radio Partners) filed a Joint Request for Approval of Settlement Agreement. There she swore that she would " . . . amend her application and substitute a two-tier corporation, Lowery Broadcasting, Inc." The Trial Judge relied on that holding out, and since the proposed settlement would simplify the proceeding, he granted the settlement, approved the agreement, and dismissed the Sage, Idas, and White City Radio Partners applications. *See* FCC 91M-1915 released June 18, 1991.

11. But Karen M. Lowery never lived up to her sworn May 29, 1991 representation. She never did (and still hasn't) amend her application and substitute a two tier corporation (Lowery Broadcasting, Inc.). Instead she filed two more interlocutory pleadings under the name of "Karen M. Lowery." *See* FCC 91M-2015 released July 8, 1991, and FCC 91M-2206 released July 18, 1991.

12. Then, on July 12, 1991 (supplemented on July 22, 1991) Karen M. Lowery d/b/a White City Radio attempted to revamp her (their) ownership structure again. This time she (they) wanted to become a limited partnership. This time she (they) drew an opposition. Heather Lee Cass had apparently had enought of this nonsense, and she opposed on July 23, 1991.

13. By this time they Trial Judge had had enough also; and since this latest switch failed at least five of *O'Conners* six-point good cause tests, he denied the requested amendment. *See* FCC 91M-2397, released August 2, 1991.

14. So we have on our hands an applicant who couldn't or wouldn't file timely *predesignation* amendments, and who inappropriately waited until after the case was designated for hearing before even trying to decide what ownership structure her (their) application(s) would take. But even *postdesignation* she (they) couldn't make up her (their) mind.

15. Karen M. Lowery *voluntarily* started out as a sole proprietorship; then she (they) *voluntarily* amended to a two-tier corporation; then she (they) tried to amend to become a limited partnership; then she (they) *voluntarily* tried to go back to the corporate form she (they) had never adopted; and finally she decided *voluntarily* to go back to a sole proprietorship. The written exhibits she exchanged refer to and rely on all three ownership structures. Consequently they were properly rejected. The Commission, other competing applicants, and the public deserve more from applicants. Karen Lowery's attempts to create an unfocused trial disaster will be rejected. She cannot be permitted to set up an inefficient trial that is less then fair to her opponents. So her application will be dismissed, and she will receive no further consideration in this Initial Decision.

Issue 1: The Standard Comparative Issue

Description of Applicants

16. *William F. Peel, Jr.* William Peel has filed BPH-890906MM as an individual applicant, a sole proprietor; *Sea Oaks Broadcasting* also claims that it is a sole proprietorship under the auspices of Rhonda Vega; and *Heather Willson Cass* has filed BPH-890914NW as a sole proprietorship.

17. When *Minority Broadcast Group Limited* filed their application on September 14, 1989, they held themselves out as being a Florida Limited Partnership with two partners: April Wortham, the sole general partner who holds 100% of the voting power, but only 30% of the equity; and Stephen Pelletier, the sole limited partner with% voting power but 70% of the partnership equity.

18. However, Minority's Certificate of Limited Partnership was not filed with the State of Florida until two years later, or September 13, 1991. And although April Wortham *swore*, on September 13, 1991, that she was Minority's general partner, neither of Minority's partners had executed any agreement by that date.[5]

19. *Crystal Communications, Inc.* Crystal holds itself out as being a two-tier (voting-nonvoting) stock corporation. Barbara Marshall owns all of Crystal's 300 issued and outstanding shares of the voting stock. This represents 20% of Crystal's equity. Ms. Marshall is Crystal's sole officer and director.

20. There are three nonvoting stockholders: William B. Murray, Jr.,[6] his brother, John Murray, and Richard N. Houlding. They each own 400 shares of Crystal nonvoting stock representing 26.67% of Crystal's equity.

21. *White City Broadcasting Inc. (WCBI).* WCBI, a Delaware Corporation has four stockholders. Leonard Walk is President, Secretary, Treasurer, and Director and owns 16.66% of the stock; Donald Jones, Vice- President, and Director owns 33.34% of the stock; Raymond Haas, Vice-President and Director also owns 33.34% of the stock; and Peter Clark, Vice President and Director own the remaining 16.66%.

22. *Midway Broadcasting Company* is a Florida, corporation with two classes of common stock. There are 2000 shares of Class A *voting* stock issued and outstanding. This stock is owned by Alice E. Lee and represents 20% of Midway's equity. Ms. Lee holds herself out as Midway's President, Treasurer, Secretary, and Sole Director, although Midway has held no corporate meetings since September 14, 1989.

23. There are 8,000 shares of Midway Class B *nonvoting* stock outstanding. The distribution of those shares has changed since Midway filed their application on September 14, 1989. Vernon D. Smith, a Florida banker owns 6,500 shares (65% equity) of that Class B stock; however, on the January 10, 1990 comparative cut-off date he held 6,000 shares. Juliette Lomax-Homier owns 1,500 shares of the Class B non-voting stock. But as of the January 10, 19990 cut-off date she owned 1,000 shares. As of the comparative cut-off date, John Giordano, a banking compatriot of Smith's owned 1,000 shares of Midway Class B. Until November 12, 1989, a Jovita Williams held 1,000 shares of Midway nonvoting common stock.

Diversification of Mass Media

24. *William F. Peel, Jr.* has no interest in any mass communication medium. His wife, Barbara Kay Peel, was an applicant for an FM license in nearby Jupiter, Florida until her application was dismissed on June 20, 1991. Mrs. Peel is also a 34% shareholder, secretary, and a director of Bennco, Inc., licensee of WDMX-FM, Vienna, West Virginia.

25. *Minority*. Neither Minority nor either of its principals has any other media interest. April Wortham has pledged to resign from any media position she holds if Minority is granted. (Minority Ex. 3, page 1).[7]

26. *Sea Oaks*. Neither Sea Oaks nor Rhonda V. Vega, has any other interest in any mass communications media. But Richard L. Vega (Rhonda Vega's husband) owns a 49% interest in Florida Radio Broadcasters, a general partnership that in turn holds a 25% general partnership interest in Coral Cove FM partnership, permittee of a new FM station at Coral Cove, Florida. Richard Vega, the managing partner of Coral Cove FM Partnership, is providing technical assistance and is responsible for overseeing the construction of the Coral Cove FM station.

27. *Crystal Communications*. Neither Crystal nor any of its stockholders has any other cognizable media interests at this time.

28. *White City Broadcasting*. Donald L. Jones is: (1) President and 50% stockholder of Turner County Broadcasting Co., the licensee of WNNQ(AM), Ashburn, Georgia; and (2) Permittee of five low power television stations, including LPTVs in St. Augustine, Cocoa, Titusville Daytona Beach, and Sebastian, Florida.

29. Leonard Walk and Peter G. Clark are each 50% stockholders of Palm Beach Television Broadcasting, Inc., licensee of low power television station W36AQ in West Palm Beach, Florida, and permittee of LPTV station W31AY, Jupiter, Florida.

30. Leonard Walk and his wife jointly holds: (1) a 2.633% limited partnership in Wheeling Radio Company, the licensee of WBBD(AM) and WEGW(FM), Wheeling, West Virginia; and (2) a 1% limited partnership interest in Nittany Broadcasting Company, licensee of WMAJ(AM) and WBHV(FM), State College, Pennsylvania.

31. None of WCBI's principal have promised to divest any of their media holdings.

32. *Heather Willson Cass* has no interest in any mass communications media.

33. *Midway Broadcasting Company*. Neither Midway nor any of its principals have any cognizable media interests. However, Vernon D. Smith, the Florida banker who owns a 65% equity interest in Midway, also owns an 80% equity interest (nonvoting stock) in Horton Broadcasting Company, Inc. (Horton). Horton is an FM applicant for adjacent Port St. Lucie, Florida.

Best Practicable Service

Comparative Coverage

34. As previously noted (Finding 3 *supra)* the Chief, Audio Service Division has called for comparative coverage evidence. The following chart lists the areas and population within each applicant's proposed 1 mV/m contour (Joint Exhibit 1; Tr. 90).

Total Areas and Population Served

Applicant	Area (Sq.Km)	Population
Peel	1280	117,471
Minority	1659	139,334
Sea Oaks	1622	136,653
Crystal	1624	136,653
WCBI	1319	120,701
Cass	1287	117,471
Midway	1642	137,732

35. In the daytime, all non-common areas receive at least five other aural services. The following chart shows that, at night, that each applicant will provide a *fifth* aural service to the following areas and population.

Fifth Nighttime Service

Applicant	Area (Sq. Km)	Population
Peel	6.5	18
Minority	32.5	91
Sea Oaks	25.1	70
Crystal	25.1	70
WCBI	12.2	34
Cass	7.0	20
Midway	25.1	70

36. On total areas and populations (Finding 34) Minority, Midway, Sea Oaks, and Crystal propose to serve between 15,952 (or 12%) and 21,683 (or 16%) more people than Peel, WCBI and Cass. So Minority, Midway, Sea Oaks, and Crystal are entitled to a very slight preference vis-a-vis Peel, WCBI, and Cass. The difference between Minority, Midway, Sea Oaks, and Crystal, and the differences between Peel, WCBI, and Cass are too insubstantial to warrant any preference vis-a-vis each other.

37. About underserved areas, the differences in the fifth nighttime service are less than 100 persons. That is insignificant.

Quantitative And Qualitative Integration

38. *WCBI* makes no claim for quantitative integration. Since no WCBI shareholder proposes to be integrated into the management of the proposed station, WCBI will be awarded 0% quantitative integration.

39. The other six applicants all *claim* 100% quantitative integration. Each such claim will be discussed separately.

40. *William F. Peel, Jr.* claims 100% quantitative integration based on his proposed sole proprietorship. Peel's opponents have attacked that claim. They argue that his ownership of four businesses in the Washington, D.C. area and offices and holdings in several Florida cities, and his commitment to those businesses renders his integration proposal unreliable overall. *See Evansville Skywave, Inc.*, FCC 92-76 released February 28, 1992 at para. 16. Those arguments will be credited.

41. At the same time William Peel filed his FM application for White City, Florida (a beach resort community), his wife Barbara Key Peel, filed for the open FM frequency in nearby Jupiter, Florida (a beach resort community). They never intended to prosecute both applications to fruition. They knew from the outset that one of the applications would be dismissed (WCBI Ex. 2, Ex. 3, Tr. 344). William and Barbara Peel decided that "whatever

station was going to be the one we had the best chance of getting was the one we were going to stick with, and this is the best one." (Tr. 340, 341, 345).

42. In harmony with that decision, William Peel pledged fulltime integration at the White City station but he did not propose local residence. Similarly, Barbara Key Peel proposed fulltime integration at the Jupiter. But neither did she propose local residence.

43. But having dismissed the *Jupiter* application, Peel now says that his wife would administer the *White City* station's EEO policy, as she does for his other businesses. She will also handle the accounting and she will have other roles in the station operation (Tr. 348-351). Thus, since the dismissal of the Jupiter application, William Peel has altered his White City integration proposal.

44. Peel claims he will work 40 hours a week as the White City General Manager. There he " . . . will supervise all aspects of the station's operations, including the overall supervision of the station's sales, programming, engineering, and clerical departments . . . " He says he will personally direct the stations relations with the community and with advertisers; he will hire and fire all personnel; he will establish salaries and . . . he will also administer the stations EEO program." But see Finding 43 *supra*.

45. Peel's ability to carry out this pledge must be weighed against the following record facts. He proposes to retain his house in Chevy Chase (Tr. 296); he proposes to retain his 70% ownership of a business he founded back in 1960, Red Coats, Inc. Red Coats, Inc. is a Bethesda, Maryland based commercial contract office cleaning company with branches in Tampa and Orlando. Red Coats employs about 4,000 people and has gross revenues in the $16-18 million range. Peel, who describes himself as a hands-on manager, nevertheless says he will turn the day-to-day operations of Red Coat over to "qualified managers," and limit his involvement with that company to a technical and advisory capacity. But he will remain President and CEO of Red Coats.

46. Although Peel didn't disclose it in his direct case exhibits, he is also President, CEO, and owner of: (1) Sea Horse Pool Service, an indoor and outdoor pool cleaning service; (2) Datawatch Systems, and electronic access control business; and (3) Peel Rental, a real estate and stock investment company. William Peel himself buys and sells the real estate and stock investments for Peel Rental, although some of the real estate holdings have property managers. Peel Realty holds property in Washington, D.C., St. Croix, Newport News, and other markets (Tr. 300-301, 309, 313).

47. At his *deposition* William Peel testified that the oversight of these businesses takes his fulltime at least 40 hours a week. As owner, President and CEO of the four businesses just described Peel takes an annual salary of $250,000. However, at the *hearing* Peel adjusted his testimony. He then testified that it rarely takes 40 hours to oversees the four businesses, and that he goes to his office at Red Coats three days a week. Peel started all of his companies himself, except for Datawatch which he purchased six years ago.

48. Peel's wife Barbara (*See* Findings 41-43 *supra)* is also involved on a day-to-day basis in her husband's four businesses. She is Secretary and Comptroller of the Peel companies, although Peel has also said that he has hired a man as a comptroller (Tr. 303, 347, 317). Mrs. Peel draws an annual salary of $60,000 which she will retain even if the White City application is granted. But, says Mr. Peel, she will relinquish her positions except as a director.

49. At first William Peel testified that he would forego his $250,000 annual salary if and when his White City FM proposal is granted (Tr. 303-304). Later he said he would take the salary "if I can't make it on the radio station" (Tr. 310).

50. In his exhibits Peel states that he has "residences" in two other Florida cities, St. Petersburg, and Sanibel. But at the hearing he identified these "residences" as the Tampa and Orlando offices of his businesses.[8] Subsequently he identified them as rental properties at which he stays while cleaning up between tenants. Peel says he spends five or six weeks at each rental property performing these functions. Peel also owns a rental property in the Caribbean (St. Croix), and says that the time spent at the three properties combined comes to about 4 months a year. (Tr. 307-308).

51. Peel spends 3 to 5 months a year at his Chevy Chase residence, and would continue to spend some time there if his White City application is granted, but "it would not be very much." He would also continue to spend time in St. Croix (Tr. 308-309, 358).

52. William Peel first learned of the White City Channel from Lauren Colby. This was the first time he had any interest in White City. He wasn't seeking application opportunities. He knew Colby because, he had spoken to him a number of times about Mrs. Peel's Jupiter, Florida application (Tr. 311, 318, 332).

53. Lauren Colby and Peel's technical consultant, Bill Benz III prepared Peel's application.[9] Colby and Benz prepared the budget and Benz found the transmitter site. Peel has never seen the site or spoken to its owner. Counsel drew up and arranged for publication of the legal public notices of filing and designation (Tr. 320-321).

54. Most of the checks in connection with the application have been drawn on the Peel Rental account (*See* Finding 46 *supra).* Some of those checks have been drawn by Mrs. Peel. At the time he was deposed Peel didn't know what a "local public inspection file is," and he was unaware of having seen his own.

55. Peel's original financing was a loan letter from the National Bank of Washington. That bank failed in August 1990, over nine months before this case was designated for hearing. But Peel never reported that fact until his attorney Lauren Colby called him in the spring of 1991 and told him to find another bank. In June 1991, he procured a bank letter from the Citizens Bank of Maryland. His petition for leave to amend his application to reflect the second bank letter was denied. *See* FCC 91M-2055 released July 5, 1991.[10]

56. William Peel first testified that he has been to White City, Florida once or twice a year (Tr. 333). But subsequently when he was asked directly he conceded that he has never stopped there, only driven through.

57. Based on the foregoing (Findings 41-56 *supra)* William Peel, Jr. has failed to show that overall his integration pledge is reliable. In light of his other financial and time commitments to four other businesses his pledge to devote 40 hours a week as the General Manager of his White City proposal rings hollow. His 100% quantitative integration claim will be denied.

58. William F. Peel, Jr. was born on December 24, 1932 in St. Louis, Missouri. He graduated from Woodrow Wilson High School in 1951 and attended American University in 1955 and 1956.

59. Peel resides in Chevy Chase, Maryland. Thus be cannot claim *local residence*. Since he has only driven through White City (Finding 56 *supra)* he cannot claim *civic participation*, and he has no *broadcast experience*. Moreover, he is a white, nonhispanic and therefore not entitled to *minority* enhancement.

60. *Minority Broadcasting Group Limited*. Minority premises its 100% quantitative integration claim on General Partner April Wortham's 30% equity and 100% voting control of the Minority limited partnership. *See* Finding 17 *supra*. They say Ms. Wortham will be the full-time station manager working a minimum of 40 hours a week. She will have overall responsibility for operating the station; she'll formulate and implement the station's programming, employment and EEO policies; and she will oversee the station's equipment acquisition and financial affairs. But Minority's opponents have conclusively demonstrated that *neither* Ms. Wortham *nor* limited partner Stephen Pelletier are or ever have been the driving force behind Minority's application. Rather the driving force behind the formation and prosecution of Minority's application, as well as behind two other applications in the same area is Ken Dawson. Dawson is ostensibly only a limited partner in Afro- American Broadcasters Limited, an applicant for an FM station in nearby Jupiter, Florida.

61. Ken Dawson is the key force behind three "cookie-cutter" FM applications for three Florida east coast resort communities: White City, Port St. Lucie, and Jupiter. These communities are located fairly close (within 20 miles) to each other. In fact, White City and Port St. Lucie are adjacent to each other. Minority is the Dawson-generated White City applicant; Afro-American is the Dawson-generated Jupiter applicant; and Salsa Radio Limited (Salsa) is the Dawson-generated Port St. Lucie applicant.

62. The following chart shows some salient details on each of the three.

CHART

Applicant	Location	General Partner	Limited Partner
Minority	White City, FL	April Wortham (30%)	Steve Pelletier (70%)
Salsa	Port St. Lucie, FL	Jose Oaks (30%)	Hilda Dawson (70%)
Afro-American	Jupiter, FL	Jimmie Horne (30%)	Ken Dawson (70%)

63. Of the six individuals listed in the Chart, Ken Dawson is the common denominator. These individuals may not know each other, but they all know Ken Dawson. April Wortham is a former employee of Ken Dawson; Jose Oaks is a former business associate of Ken Dawson when Dawson still lived in Connecticut; Jimmie Horne is a present business associate of Dawson's; Steve Pelletier is Jose Oaks' business partner and Oaks introduced Pelletier to Dawson; and Hilda Dawson is Ken Dawson's mother.

64. The formational documents for all three applicants are alarmingly similar. All three applications were filed within about a month of each other (between September 14, 1989 and October 18, 1989). If fact, Minority's and Afro-American's were filed the same day. The same FCC counsel, Ms. Nora Garrote of Piper and Marbury, represents all three.

65. Majority, Salsa, and Afro-American are each limited partnerships. Each has one general partner who purportedly owns 30% of the partnership equity; each has one limited partner who owns the other 70%. The financing for each of the three applications will purportedly come from the limited partner. Each of the general partner's (Wortham's, Oaks', and Horne's) cash contribution to their respective partnership is identical, $2,300. The total of financing proposed for each application is similar and differ by only a few thousand dollars.

66. Each applicant was formed in an identical manner. Originally, and because of filing time constraints, there was a temporary short-form limited partnership agreement executed. However, the short-form agreement expressly provided that a subsequent long-form limited partnership would supercede it.

67. Each of the three long-form agreements provides that "The Limited Partner shall contribute three hundred and ten thousand dollars." However, that $310,000 figure doesn't accord with the amount set forth in parentheses in the long-form agreements for Minority ($317,000) and Afro- American ($312,000).

68. The short-form, two-page preliminary agreement for each of the three applicants are identical except for client-specific information. All three were prepared by the same Florida law firm: Akerman, Senterfitt and Edsen. Minority's and Afro-American's short-form agreements were executed the same day, September 14, 1989. Minority's and Afro-American's Certificates of Limited Partnership were also both filed with the Florida Secretary of State on September 14, 1989.

69. The affidavits that accompany Minority's and Afro-America's Certificates of Limited Partnership were both executed on September 13, 1989, and notarized by the same Notary Public. Both affidavits provide that the limited partners' contribution; i.e.'s Pelletier's and Ken Dawson's contribution would be $317,000. But that amount isn't consistent with the $312,000 listed in the Afro-American partnership agreement.

70. The three long-form agreements (Findings 66-67 *supra)* are also identical in content except for client-specific information. They too were prepared by the Akerman law firm (*See* Finding 68 *supra).* As previously noted (Finding 67 *supra)* the three partnership agreements even contain curious identical typographical errors about the cash contributions of each of the three applicants.

71. The signature page for Dawson and Horne on the Afro-American long-form agreement and the signature page for April Wortham on Minority's long-form agreement were executed before the same notary, and on the same date, January 5, 1990, in Palm Beach County. But Ms. Wortham resides in Miami, Florida, in Dade County. When Ken Dawson was asked about the identical execution, he said that he had arranged for his and Horne's signatures to be executed before that notary in Palm Beach county. But he *denied* that Wortham was present with

himself and Horne at the Notary's office. Rather he admitted only that he had "suggested" that same Notary to Ms. Wortham (Tr. 1391, 1394).

72. Afro-American (Ken Dawson and Horne) amended their application on January 8, 1990. But the cover letter to that amendment lists Minority, not African-American, as the client. Ken Dawson couldn't explain the discrepancy.[11]

73. Dawson, the catalyst for April Wortham's interest in the White City application, learned about the Jupiter, White City, and Port St. Lucie allocations either from *Broadcast* magazine or from local newspaper. He first approached Ms. Wortham at a Women in Communications Banquet. Wortham and Dawson were previously acquainted because they both worked at Station WFOM(AM), Riviera Beach, Florida. He mentioned the upcoming windows to Wortham and they agreed that he would call her to discuss them at another time. They did not discuss the specific allocation at that meeting. Wortham said she was interested in applying, but lacked the money to do so (Tr. 386-388, 391-392).

74. Later Dawson telephoned Wortham. They specifically discussed the White City and Jupiter allocations. Dawson told her he knew someone with money who was interested in broadcast investments. Wortham thought it over for about a week. She then called Dawson back and ask him to arrange a meeting with the financial backer. During this conversation Dawson identified the proposed investor as Steve Pelletier and said Pelletier was "ready to invest." Wortham depended on Dawson to produce a financial backer "to make sure everything is in order."

75. Dawson then set up a meeting between Wortham and Pelletier. Dawson had already been introduced to Stephen Pelletier through Jose Oaks. *See* Findings 62-63 *supra*. Jose Oaks, a business acquaintance of Ken Dawson when Mr. Dawson was still in Connecticut, had previously been in a broadcast venture with Hilda Dawson, Ken's mother. Oaks and Mrs. Dawson were principals in Urban Broadcasting Corporation's (Urban's) FM application for Orlando, Florida in 1986. Oaks is also the 30% general partner in Salsa Radio Limited, the Port St. Lucie applicant. Hilda Dawson is the 70% limited partner in Salsa.

76. Wortham and Pelletier met in West Palm Beach in September 1989 just before Majority's application was filed. The had never met before, and Ken Dawson was there to introduce them. In fact, Wortham and Pelletier did not meet again after that September 1989 meeting until July 1991, the date of the depositions in this case.

77. At the hearing Ken Dawson, was asked if he'd advised either Jose Oaks or his mother in connection with their Orlando filing. *See* Finding 75 *supra*. He denied ever having advised either Oaks of his mother in connection with their Orlando application (Tr. 973). When asked if he'd advised "anybody" in connection with BPH-860507NS, the Orlando application, Ken Dawson said: "I did not advise anyone."

78. However, Exhibit 1 of Urban's Orlando application lists Ken Dawson as a "consultant to the applicant corporation;" the address for Urban Broadcasters is Dawson's address; and Hilda Dawson's address on the Urban application is her son's address. Subsequent examination at the hearing revealed that he had actively helped prosecute that application (Tr. 1351, 1364-1368, 1403-1406, 1413, 1444, and 1449).

79. Despite all the similarities between the Port St. Lucie, White City, and Jupiter applications (*See* Findings 64-70 *supra)*, Ken Dawson denies having any input into the Salsa Radio application; i.e., his mother's and Jose Oaks Port St. Lucie application. However, his denials don't hold together (Tr. 1019-1020, 1285-1286, 1289-1292, and 1296).

80. Dawson testified that he didn't recommend the Akerman law firm (*See* findings 68 and 70 *supra)* to April Wortham. He further testified that he had not selected the Akerman law firm for Afro-America's legal work. But he acknowledged that Urban Broadcasting used Akerman in the Orlando proceeding back in 1986. Dawson further acknowledged that he was acquainted with Jim Bacchus of Akerman in connection with Urban's application. It was Bacchus that April Wortham spoke to when she ostensibly retained the Akerman firm to perform legal services for Minority (Tr. 444).

81. Dawson referred Wortham to engineer Lee Simmons, Minority's engineering counsel. Simmons was also Afro-American's engineer, but Dawson claims that it was Jimmie Horne, Afro-American's general partner that hired Simmons to prepare their Jupiter application. But the bill for Simmons' work on Afro-American's application was sent to Ken Dawson. And Ken Dawson paid the bill.

82. Ken Dawson says he knew FCC counsel, Nora Garrotte in the summer of 1989. *See* Finding 64 *supra*. But he says he didn't recommend her to either Wortham or Oaks. He says he didn't know how Ms. Garrotte became counsel for all three applicants (Tr. 1444).

83. However, there is evidence that Ms. Garrotte's law firm billed Minority for the drafting of a consulting agreement with Dawson in connection with the White City application. However, no copy of that agreement was produced on discovery, and Ms. Garrotte represents that no draft of that agreement has been found.

84. Ken Dawson says he wasn't aware that a consulting agreement had been drafted, but when he became aware of it, he told April Wortham he was not interested in consulting because it is "not my line of work." (Tr. 1274-1277.) But April Wortham has always viewed Mr. Dawson as a broadcast consultant with an ongoing consulting business (Tr. 389, 406); Stephen Pelletier testified that when Josa Oaks introduced Dawson to him he (Oaks) said that Dawson was a communications consultant (Tr. 630-633); and whoever filled out the Orlando application certainly believed Ken Dawson was a broadcast consultant (Finding 78 supra).

85. Jose Oaks, Salsa Radio's general partner is presently employed as Minority's certified public accountant, and acts as Minority's financial adviser. Oaks keeps Minority's financial records. Oaks is also Stephen Pelletier's business partner in O & P Realty in Connecticut. April Wortham says she hired Oaks at Pelletier's suggestion. She further states that she hasn't paid Oaks for his services, but that Pelletier advised her not to worry about Oaks' bill. Pelletier, in turn, testified that he has never paid Oaks and says that he never told Wortham that he would take care of Oaks' bill (Tr. 482-483, 717-719).

86. When it came to locating a transmitter site for Minority's White City proposal, Ms. Wortham turned to Ken Dawson. Dawson, in turn, called Minority's FCC counsel, Nora Garrotte, about the problem. Ms. Garrotte had several phone calls with Ken Dawson about both the

transmitter site, and Minority's filing fee. At one point Ms. Garrotte reminded Dawson to check with Wortham about getting the filing fee and the application returned in time for filing.

87. April Wortham claims she prepared her own budget for Minority's White City proposal. But Minority's construction and three-month operating budget is identical in format to Afro-Americans. Afro American's total construction and operating cost is $317,000, the same as the construction and operating costs listed in Minority's application and limited partnership agreements. There is a $5,000 difference between Afro-American's total construction and operating budget and the $312,000 Ken Dawson has agreed to contribute to Afro-Amesupra) Minority's opponents have conclusively demonstrated that April Wortham's overall integration pledge is totally unreliable.[12] Ms. Wortham, although purportedly the sole general partner, does not now and never has controlled the formation and the prosecution of Minority's White City FM application. Nor has she been that active in Minority's affairs. Accordingly, Minority will be rewarded 0% quantitative integration.

89. April Wortham was born January 31, 1965. As previously noted (Findings 60 *supra)* she'll be Minority's full-time station manager working a minimum of 40 hours a week. She presently resides in Miami, Florida, but will terminate any other employment if Minority gets a construction permit.

90. Ms. Wortham claims *past local residence*. She lived in Fort Pierce, Florida from August 1987 through November 1988. She also claims credit for *civic activities* within the service area. She was: a member of the Gold Coast Urban League from 1987-1990; a member of the Community Relations Board of the South Florida NAACP; and a member of Women in Communications since September 1987.

91. April Wortham has extensive *broadcast experience*. The following Chart summarizes that experience:

CHART

Date	Job	Station
1982-1984	Disk Jockey, New Reporter Production Assistant, Ad Representative (Full Time)	WSUH(FM), Oxford, MS
1982-1987	TV Show Co-Host, Reporter	"Ole Miss Magazine" produced at University of Mississippi and televised statewide.
1983-1984	Co-anchor of various shows, Reporter (Part time)	WMTV-TV, Oxford, MS
1984-1987	News Director	WKLJ(FM), Oxford, MS
1985-1987	Radio Host/ Producer	"Ole Miss Today" produced at University of Mississippi.
Summer 1984	Summer Intern: covered the Congressional beat, and wrote reports (Fulltime)	USA Today Radio Washington, DC
Aug-Dec 1987	Reporter (Fulltime)	WPTV-TV, West Palm Beach, Florida
Oct 1987 Oct 1988	Reporter (October 1987-1988); News Director (January 1988-October 1988).	WPOM(AM), Riviera Beach, Florida

92. April Wortham is Black, and claims the minority enchancements accruing to a Black person.

93. *Sea Oaks Broadcasting*. Sea Oaks bases its 100% quantitative integration claim on Rhonda Vega's sole proprietorship (Findings 16 and 26 *supra),* and her assertion that she will work fulltime, at least 40 hours a week, as the proposed stations' general manager. She claims that she "will direct and supervise the station's overall Management and operation, including hiring and firing of employees, public service and community affairs, sales and financial planning." She further states that "[a]ll management personnel will report to Rhonda Vega."

94. Sea Oaks will receive 0% quantitative integration. Its opponents have demonstrated the White City FM proposal (if granted) would not be Rhonda Vega's, but merely another communications asset of the Richard L. Vega Group. Rhonda Vega is the director, and vice president, and she and her husband, Richard Vega, jointly hold all the stock in the Richard L. Vega Group, a broadcast engineering and consulting firm. They have been joint owners since the Vega Group was formed in 1987.

95. She and her husband are also joint owners of Vega 900, an organization formed in 1989 to permit Rhonda and Richard Vega to file nationwide paging applications and special mobile radio applications on their own behalf. Sea Oaks Ex. 3, page 2; Tr. 1055, 1059, 1061, 1063-65, 1195-1196. Rhonda and Richard Vega are stockholders/directors of both entities.

96. Within the Richard L. Vega, Group, Ms. Vega runs the multi-point distribution department and her husband runs the cellular department. While they discuss the financial aspects of their departments, she says they each make decisions for their departments without consulting the other. However, the FM portion of the Vega Group's business is not strictly defined, and Rhonda Vega doesn't know who runs that department.

97. Richard Vega's son, Vincent Vega, worked as an engineer for the Vega Group from January 1989 to December 1989. He, along with another Vega group employee, prepared the White City FM application. Expenses for the application were paid out of Richard and Rhonda Vega's joint account and drafts from Rhonda Vega's money account, the only account in her own name. However, it is Richard Vega that provides the funds for all the accounts (Tr. 1135, 1150).

98. On January 12, 1990, Rhonda Vega made a check payable to the Richard L. Vega Group for reimbursement of the filing fee (which the Group paid for), for service rendered to prepare the application, and for the Group's out-of-pocket expense.

99. The Vega Group maintains two checking accounts at the same bank. Rhonda Vega is an authorized signatory on both. Revenue from cellular radio work is deposited in one account; revenue from MDS services is deposited in the other. Mrs. Vega wrote checks for her application expenses on both accounts. The deposit checks to secure tower space was written on a Richard L. Vega account and was signed by Peggy Barstow, a Vega Group employee.

100. Rhonda Vega learned that the White City FM was available some time in August 1989 from a computer printout that the Vega Group engineers receive. She doesn't recall why she picked White City out of the listing,[13] but it is close to her Vero Beach residence and she likes the area. Before she filed she never visited White City, nor personally contacted anyone there. So she knew nothing about the community.

101. With the September 14, 1989 filing deadline imminent, and at the end of August or beginning of September 1989, Rhonda Vega went to Vincent Vega for help with her White City application (Findings 97 *supra)*. Vincent Vega worked on her application as a Richard L. Vega group employee. He was responsible for its preparation. He did the engineering and filed the application (Lowery Ex. 4; Tr. 1073-1075).

102. Section II, Question 8(b) of the application asks whether other family members have media interests/applications. She says that after conferring with Vincent Vega she answered "no" to that Question because they felt that the Question applied only to interests in the same area (Tr. 1105-1107).[14]

103. When she prepared her White City application, she never asked her husband, Richard Vega, about any broadcast interests he might have, even though he is involved in business ventures without her knowledge. Consequently, she failed to disclose that her husband has a 49% equity interest in Florida Radio Broadcasters, a general partnership which presently owns a 25% general partnership interest in Coral Cove FM Partnership, the permittee of a new FM station in Coral Cove, Florida; and she also failed to disclose that her husband, Richard Vega, is the managing partner of the Coral Cove permittee, that he is providing technical advice, and that he is responsible for the construction of the station (Tr. 1052-1053).

104. When Rhonda Vega prepared her White City application, she never asked Maureen Vega (Richard Vega's daughter) if she had any applications. Consequently, she failed to disclose that Maureen Vega had a pending application for Vancouver, Washington.

105. It was Vincent Vega who located Rhonda Vega's transmitter site; it was Vincent Vega who wrote to the tower owner, Don Cook of WOVV-FM and asked if Mrs. Vega could use the site. It was Vincent Vega who determined that there was reasonable assurance of site availability.

106. Mr. Cook's letter verifying that the site was available is addressed to Mrs. Vega personally at her Longwood, Florida home address. But she doesn't remember receiving it at home; and she doesn't remember when she received it. She says she never provided Cook with the format for the letter and she doesn't know who did. But the format of the letter looks like a format used by the Richard L. Vega Group. She doesn't know who provided the site address found in Mr. Cook's letter; it is not her writing.

107. It was Vincent Vega who instructed Rhonda Vega that she was not required to prepare an EEO program for her application. Tr. 1224. It was Vincent Vega who signed the letter transmitting the White City application to the Commission on September 13, 1989 (Lowery Ex. 4).

108. The check accompanying the application was written on a Vega Group account, was annotated "White City Florida, filing fees, Sea Oaks Broadcasting," and was signed by Penny Barstow (Finding 99 *supra)*.

109. The $150,00 cost estimate for the White City construction and operation budget came from Mrs. Vega's previous applications for Tice (1988) and Beverly Hills (1987). (Tr. 1081, and Footnote 13 *supra)*. The White City budget wasn't arrived at until after the application was filed (Tr. 1082, 1084). It was not tailored to White City and is substantially similar to the two earlier budgets.

110. It was Vincent Vega who selected the Mercantile Sale Deposit and Trust Company in Baltimore to provide Rhonda Vega with a financial reasonable assurance letter. Mercantile provides financing letters for Vega 900 (*See* Finding 95 *supra)* paging applications. However, Vega 900 also files applications for Richard and Rhonda Vega on their own behalf.

111. After Vincent Vega selected the Mercantile bank, he asked Mrs. Vega if he should send a letter requesting financing to Mr. Steil. Mrs. Vega said "yes" (Tr. 915-917). Mrs. Vega did not draft the letter to the bank asking for financing. Vincent Vega recalls talking to Mr. Steil on the phone. But he can't recall if that was before or after he sent the letter. Vincent Vega also doesn't recall discussing Mrs. Vega's financial situation with Mr. Steil or sending a financial statement.

112. Mrs. Vega has never met Mr. Steil. Her only past business contact with him was through correspondence on financing for Vega 900 applications when she provided Vega's financial data. She has never had any *personal* dealings with the Bank about Vega 900; she has never provided any financial data for herself, or demographic data about White City to the Mercantile Bank; she has never provided the Bank with any plans she may have for the radio station; and she has never provided the Bank with any separate financial information on herself. She has no account at the Bank, and her only conversation with Mr. Steil occurred about two or three months before she testified in this case on September 16, 1991 (Tr. 1089, 1198, 1243-1250). In brief, the Mercantile Bank has never been given any documents which would permit them to draw up a valid loan letter for the applicant, Rhonda Vega.

113. Moreover, even the loan letter the Mercantile Bank did provide was premised on an inaccurate set of facts. For example, Steil's September 11, 1989 loan letter states:

> "We contemplate requiring a pledge of the stock of the proposed corporate licensee, a pledge of the assets of the radio station . . . and we may also require *your* personal guarantee" (underlining added)

Although Rhonda Vega holds herself out as being a sole proprietorship between September 11, 1989, and August of 1991 she never inquired into what Steil meant when he referred to "a pledge of the stock of the proposed licensee."[15]

114. It wasn't until August 1991, with the hearing imminent (*See* Finding 5 *supra),* that Mrs. Vega ask Steil to "clarify" the Bank's collateral requirements. Steil sent Mrs. Vega a letter on August 28, 1991. There he referred, *inter alia*, to " a personal guarantee in a form satisfactory to the bank." (underling added). Mrs. Vega has never asked why the Bank changed the collateral requirement from "your personal guarantee" to "a personal guarantee satisfactory to the bank." The newspaper's invoice for publishing the local notice was directed to the Vega Group, as was the invoice for publishing the notice of filing.

115. The White City application is but one of several applications that the Vega family has been involved with. Richard L. Vega was a principal in applications for Sacramento, California, and Coral Cove, Florida. Maureen Vega has been a principal in three applications: North Bend, Oregon; Sacramento, California; and Vancouver, Washington. In North Bend, Maureen Vega was the only voting partner, and the limited partner was her brother Vincent. In Sacramento, the three principals were Maureen Vega, her father Richard Vega, and an engineer who worked for the Vega Group, David Larson.

116. In Vancouver, it was Richard Vega who brought the allocation to Maureen Vega's attention. He also arranged for a limited partner, Billy Parrot, and negotiated her 20% equity arrangement before approaching her. Billy Parrot is an old friend, and business colleague of Richard Vega. Maureen Vega (the General Partner) never spoke to Billy Parrot (the Limited Partner) before the Vancouver application was filed, and all arrangements were made through Richard Vega and Vega Group.

117. In addition to White City, the Vega Group also prepared the two other applications in which Rhonda Vega was a principal; i.e., in Tice, Florida (BPH-871119MF) and Beverly Hills, Florida (BPH-871119MF). The applicant for Tice and Beverly Hills was called Female Frequency. Rhonda Vega owned 33 1/3% of Female Frequency; Barbara O'Connell, an employee of Billy Parrot owned 33 1/3% of Female Frequency; and Geraldine Parrot, Billy Parrot's wife, owned 33 1/3%. Both the Tice and Beverly Hills applications have been dismissed.

118. Based on the foregoing (Findings 93-117 *supra)* Sea Oaks will be awarded 0% quantitative integration. BPH-890914MO is not the sole proprietorship it is represented to be. This is not Rhonda Vega's application. Rather, Sea Oaks' application is an asset of the Richard L. Vega Group, an organization dominated by Rhonda Vega's husband, Richard Vega. It is the Richard L. Vega group, using Rhonda Vega as a front, that has prepared and has prosecuted Sea Oaks' application. By using Rhonda Vega as a front, the applicant would avoid the diversification demerit that would attach to Richard Vega's ownership and managerial interest in Coral Cove FM partnership. *See* Findings 26 *supra*. And by holding out Rhonda Vega as the sole proprietor, Sea Oaks would receive comparative enhancement for the then viable female preference. So the conclusion is warranted that Rhonda Vega's ownership structure and her integration pledge lack overall reliability.

119. Rhonda V. Vega was born November 1, 1954. She presently resides at 180 Haviland Point in Longwood, Florida with her husband, Richard Vega. Since May 1988, they have owned a condominium in Vero Beach which is within Sea Oaks proposed 1 mV/m contour. While she now spends about 7 days a month there, she proposes to reside full-time in the Vero Beach condominium if Sea Oaks is granted. However, she hasn't decided whether her only child, a 10-year daughter in elementary school or her husband will live with her. Tr. 1115, 1130, 1192.

120. She is currently pursuing a Bachelor of Arts degree in Radio/Television at the University of Central Florida, in Orlando, Florida. She is a part-time student and has been since 1986. But, to meet her integration commitments she will suspend her present studies, and terminate her "independent communications consulting activities with the Richard L. Vega Group." Sea Oaks Ex. 3, pp. 1-2, Tr. 1125-1126.[16],[17]

121. Rhonda Vega worked for Telecommunications System from 1974-1979. She provided secretarial service, she billed, she kept the books, and she helped with promotion and programming. Telecommunications provided multipoint distribution for the Baltimore, Maryland area. Mrs. Vega left the work force for six months in 1981, and gave birth to her and Richard Vega's daughter (*See* Finding 119 *supra).* From 1981 to 1985 Mrs. Vega worked at Richard L. Vega and Associates (the predecessor to the Vega Group) two to three days a week when daughter was occupied in preschool activities (Tr. 1115-1117).

122. In 1984, Mrs. Vega started her own animal grooming business. She spent 30 hours a week at this function. Since she became a part-time student in 1986, and during the school year, she spends about 20 hours a week at the office of the Richard L. Vega Group, and about 20-30 hours a week during her summer vacations.

123. Rhonda Vega can claim no non-searchlight broadcast experience or civic participation. She is not eligible for minority enhancement.

124. *Crystal Communications, Inc.* Crystal bases its claim to 100% quantitative integration on the integration pledge of Barbara Marshall (see Finding 19-20 *supra).* Ms. Marshall owns all of Crystal's 300 issued and outstanding shares of voting stock. These 300 shares of voting stock represent 20% of Crystal's equity. She is Crystal's sole officer and director.[18]

125. If Crystal is granted, Marshall has pledged to terminate her employment and become the full-time (minimum of 40 hours per week) General Manager of Crystal's station. In that capacity, she will have ultimate supervisory authority and responsibility over all station operations; she will establish and implement station policies; she will supervise and coordinate all department heads; and she will generally supervise all station employees.

126. Barbara Marshall was born in New York, New York on April 8, 1952. Since September 1991, she has *resided* in Port St. Lucie, Florida. Port St. Lucie is contiguous to White City and within Crystal's proposed service area. From February 1988 until September 1991, she lived in Cape Coral, Florida, outside the proposed service area.

127. From 1987 to 1988 she lived in Port St. Lucie, and from 1982 to 1987 Ms. Marshall resided in Fort Pierce, Florida. Fort Pierce is contiguous to White City and within the proposed service area. Ms. Marshall will move to White City if Crystal obtains its FM construction permit.

128. Ms. Marshall attended Kingsboro Community College in Brooklyn, New York, and later Fayetteville State University in Fayetteville, North Carolina. She majored in Business Administration. She has also taken courses and attended seminars in business and radio management.

129. Barbara Marshall has *past broadcast experience*. She started out as a part-time receptionist at Station WIZD(FM) in Fort Pierce, Florida, in early 1983. A short

time later she became a full-time receptionist, and later Sales Coordinator. She created sales proposals and promotions; she worked closely with station account executives; and she coordinated sales copy and arrangements with clients. Later, she hosted a one-hour talk show that aired issues of interest to Black community. She was also responsible for an overnight air shift. She also handled public service announcement production and scheduling.

130. In April 1985 Ms. Marshall became Office and Traffic Manager at Station WAVW(FM) in Fort Pierce. There she billed, she hired office staff, she handled the stations checkbook, and accounts payable and receivable, she generated invoices and statements, she purchased office supplies, she set up trade accounts, and she maintained the station's public file.

131. The following year, in June 1986, Marshall became the Traffic Manager at WKGR(FM) in Fort Pierce. She also assumed responsibility for the station's commercial schedule, station logs and billing, and co-operative billing arrangements. She also hosted a weekly public affairs program.

132. Then in February 1988, Barbara Marshall became the Station Manager at Station WAKS(FM), then WRCC(FM), in Coral Gables, Florida. While she was Station Manager, her responsibilities also included those of a business manager, an office manager, and a traffic supervisor. At various times, because of turnover in ownership and management, she also acted as Program Production Director and Sales Manager. She reported directly to the Station's General Manager and owners. Seventeen full-time and six part-time employee reported to Marshall who was second in command.

133. Marshall currently is Station Manager/Office Manager at Station WZZR(AM), Port St. Lucie, Florida. She took that position on September 3, 1991 (Tr. 1472).

134. Barbara Marshall will also be credited with *civic participation* while residing within the proposed service area. From January 1984 to March 1986 she was a member of the American Business Women's Association in Fort Pierce. She participated in the fundraisers and in the monthly dinner meetings that were held to discuss education and the advancement of women in the workforce. She devoted about three to six hours a month to this activity.

135. From July 1984 to July 1985 Marshall was a 4-H Children's Group leader in Fort Pierce. The Group consisted of seven children. They held monthly meetings and periodic fundraisers on Saturday. This culminated in a Halloween party for disadvantaged children. She devoted five or six hours monthly to this activity.

136. Ms. Marshall was involved in Marine Toys for Tots in St. Lucie County within the proposed service area from 1984 to 1988, and she was a member of the Antioch Missionary Baptist Church in Fort Pierce during the same time period.

137. Barbara Marshall is Black and is entitled to minority enhancement. It was Barbara Marshall who gave the name "Crystal Communications, Inc." to the applicant. Crystal is her daughter name.

138. Crystal's opponents have attacked the overall reliability of Crystal's ownership structure. They claim that the non-voting stockholders are not sufficiently isolated from the station's proposed operation that they can be considered passive investors. They further argue that non-voting stockholder, William Murray (*See* Finding 20 and Footnote 6 *supra),* is the driving force behind the formation and prosecution of Crystal's application.

139. Although Crystal's opponents' arguments have some merit, the weight of the evidence calls for their rejection. It's true that neither Crystal's certificate of incorporation, nor the corporate bylaws prohibits the non-voting stockholders from being employed at the station or from consulting on an unlimited basis with the voting stockholder about matters relating to be the application and the station. (Tr. 1568-1570, 1889-1890, 2024-2025, and 2114-2115).

140. On the other hand, Crystal's Certificate of Incorporation states that the Class A voting stock entitles Barbara Marshall, and only Barbara Marshall to vote on all matters affecting the corporation. She is aware of the rights and restrictions on the Class A and B stockholders, and she intends to exclusively manage and control the proposed station.

141. She says that, as a matter of courtesy and business etiquette, she will provide information about the station's financial performance to her co-owners. But, she says, she will make all the decisions, and set all the policies; she does not intend to seek their advice; and they have not offered her any advice thus for.

142. William Murray acknowledges that Crystal's corporate papers may not explicitly bar his retention as an employee or consultant. However, he points to the integration statement, Crystal's application and their subscription agreement. He says that these documents implicitly (if not explicitly) prohibit him from any active role. He says that he has no intention of circumventing these promises that Crystal has made to the Commission: "I can't do that and I don't want to do that, and I won't do it." (Tr. 1887-1890; also see Tr. 2024-2025, and 2114-2115).

143. The evidence shows that the limited partners (the 2 Murrays and Houlding) did not recruit Barbara Marshall. She learned that the White City channel was available from a friend, Gary Firestone. Gary Firestone, in turn, learned about the channel's availability from his cousin, Martin Firestone, an attorney at Mullin, Rhyne, Emmons and Topel, P.C.

144. The evidence also shows Ms. Marshall negotiated for 20% equity at arms-length; and that (consistent with an agreed-upon "sweat equity" arrangement) she has paid her share of the funds needed to prosecute the application.

145. Except for one piece of work, Barbara Marshall has fully prosecuted Crystal's application. She retained legal counsel; she retained engineering counsel; she has worked closely with both her legal and engineering counsel both in preparing Crystal's application and amendments, and running its litigation efforts; and she assisted in preparing Crystal's Equal Opportunity Program, and exhibits to the application.

146. Ms. Marshall arranged for maintenance of Crystal's public inspection file; she handled the notice of designation for hearing; she located and entered into an arrangement for Crystal's first transmitter site; and, with counsel's assistance, she located and arranged for securing its amended site.

147. Before Crystal filed its application Ms. Marshall opened a bank account for Crystal at CS&N Bank in Cape Cove, Florida, where she lived. Only she has check-writing authority. Only she has written checks (Tr. 1564- 1567; Crystal Ex. 1, p. 7). Crystal's non-voting stockholders do

not receive copies of counsel's bills from either Howard Weiss or Barbara Marshall. Moreover, Marshall does not discuss the bills with them or consult with the investors on whether the bills should be paid (Tr. 1761-1762, 1926-1927). The evidence points conclusively to Barbara Marshall's being a *femme sole trader*.

148. However, as noted (finding 145 *supra),* there was one prosecutorial chore that non-voting stockholder, William Murray, assisted Barbara Marshall with. In September, 1989, shortly before Crystal was to file its application, Ms. Marshall tried to obtain a loan letter for Crystal from the Barnett Bank in Florida. She used a sample letter that counsel (Weiss) had provided her. But because of the Bank's long loan approval process, she soon realized that she wouldn't be able to obtain a loan letter before the September 14 filing deadline.[19]

149. So she turned to William Murray for assistance. Murray contacted U.S. Trust, a Boston bank. He met with Cynthia Tsakonas, a loan officer with whom he was familiar with from an earlier business deal and loan request. Murray presented Ms. Tsakonas with the same sample loan letter Weiss had made available to Marshall. He also presented her with a budget that Barbara Marshall had prepared with Weiss' help and the help of a friend in the broadcast business, Paul Wolf.[20] Murray and Tsakonas discussed Marshall, and he showed her Marshall's resume. Based on these materials and financial data the Bank already had on Murray and Houlding, Murray secured a loan letter (Crystal Ex. 1, p. 7; Midway Ex. 3; Tr. 1541-1548, 1758, 1863-1869, 1938-1942).

150. Primarily based on William Murray's role in obtaining Crystal's bank letter, Crystal's opponents argue that Crystal's non-voting stockholders aren't sufficiently isolated from the prosecution of the FM proposal, and therefore that Crystal's ownership structure lacks overall reliability.

151. That argument is rejected. *See Evansville Skywave Inc.*, FCC 92-76 released February 28, 1992. First of all, no misrepresentation is involved. No one has shown that either Barbara Marshall or William Murray have dissembled about Murray's role in obtaining Crystal's loan letter. Both Marshall and Murray have been straight forward about the incident. In addition, this is the *only* incident of a non-voting stockholder's active participation in the prosecution of Crystal's application.[21] Moreover, Ms. Marshall has affirmatively demonstrated that she is Crystal's genuine voting stockholder, a voting stockholder that can and will carry, her duties as the General Manager of the proposed FM station. So the conclusion (Findings 140-141 and 143-147, *supra)* is fully justified that Barbara Marshall is no front for the non-voting stockholders. Crystal is awarded 100% quantitative integration.

152. *Heather Willson Cass*, a sole proprietor, predicates her 100% quantitative integration claim on her representation that she'll move to White City, Florida, and work full-time (at least 40 hours a week, as the proposed station General Manager. In that capacity, she'll oversee all station operations and set all station policy. She'll also implement the station's EEO policy.

153. Cass' quantitative integration claim will be rejected. She has not persuasively demonstrated that she can and will carry out her integration pledge.

154. Heather Cass was born on November 12, 1947. She resides in Chevy Chase, Maryland with her husband and two children, ages 5 and 13. She has owned her own home in Chevy Chase for 11 years, and has lived in the Washington, D.C. area for nearly 20 years. (Tr. 2145, 2161, 2163). The Cass' children are in kindergarten and eight grade at Sidwell Friends School in Washington, D.C. Tr. 2161, 2173. Her husband, Richard, is a partner in the Washington D.C. law firm of Wilmer, Cutler and Pickering (Tr. 2165). She also has at least one sister living in the D.C. area.

155. Ms. Cass says that her relationship with her husband is good, that they share activities in common, and that they like to spend time together. However, Ms. Cass' husband will not relocate full-time to White City with Ms. Cass. Instead he will purportedly commute to his office in Washington D.C. from White City.

156. Heather Cass is a self-employed architect. She is the sole owner of Cass and Associates Architects, an architectural design firm. She founded the firm in 1978, and has built her architecture practice into a highly successful business. Cass and Associates and Heather Cass are best known for residential design, and have won at least five awards for design. She employs seven people, including three other registered architects. By industry standards, Ms. Cass has a successful practice. She takes a salary from the business, and some years she does "very well" (Tr. 2145, 2147, 2163, 2164, 2234).

157. Cass and Associates' success is a product of Ms. Cass' education, training, and work experience combined with a high level of personal effort and long years of hard work. She received her undergraduate degree in art history from Mount Holyoke College in 1969, and her degree in architecture from Yale.

158. After graduating from Yale, Ms. Cass worked for two years at Keyes, Lesbridge and Condon, a prestigious Washington-based architectural firm. In 1974 she accepted a "Louis Foundation Fellowship" to study for one year under a "very prominent architect in Japan." (Tr. 2154-2155, 2234). Later she taught architecture at the University of Maryland, and while doing so she carried her own architecture practice (Tr. 2146, 2155). In 1978 she left teaching to build her practice on a full-time basis.

159. Ms. Cass has continued to do some teaching. She was a visiting professor at Ohio State in the spring quarter of 1990; she has co-taught with Stanley Tigerman, a highly acclaimed architect, at the University of Illinois (Chicago Circle); and a course at the University of Miami in 1979 or 1980. (Tr. 2157).

160. Ms. Cass obtains business from client referrals, publication of her work, lecturing, and entering competitions. She does what she needs to do to maintain visibility. (Tr. 2152). As she puts it " . . . because it's residential work and it --- and it is my firm, I --- I stay very close to it, so I actually work on every project . . . I'm involved at some level on every project." (Tr. 2160). Consequently she puts in "between 50 to 60 hours" of work "in an average week." (Tr. 2158). She says that when it comes to devoting time to architectural design work. She decoves "as much as I can and much less than I'd like to." (Tr. 2158).

161. The only jurisdiction in which Ms. Cass is a licensed architect is the District of Columbia, and most of her projects have been in the D.C. area.

162. The Trial Judge, as well as Cass' opponents, questioned Heather Cass at length about why she was willing to "relinquish her practice," uproot her, and her family's lifestyle, move to the small resort town of White City,

Florida, and become the Owner and General Manager of an FM broadcast station, an occupation for which she has no experience.

163. Her responses, in their totality, are less than convincing. On the one hand she describes architecture as "a very tough and demanding business." (Tr. 2177, 2182). On the other hand she says that the reward she expects to get from broadcasting is "the challenge of a new business and a new learning curve." She says she wants to do something else for the rest of her life. (Tr. 2177). But, in the same breath she says she'll " . . . continue to be very interested in architecture." Moreover, she says that she still enjoys architecture and would like to do more design work. (Tr. 2158-2159). She still feels satisfaction from seeing her completed work. (Tr. 2188).

164. Ms. Cass talks about a desire to build something lasting. (Tr. 2238). But she can't explain why seeing a building she designed doesn't fill that need. Nor can she explain how operating a radio station will. Cass says that the only lasting monument a radio station would supply is having built a business. But that is exactly what she has already done.

165. The record evidence mandates the conclusion that it is highly improbable that Heather Cass will ever fulfill her integration pledge. Given her years of training for and dedication to her successful career, given the personal hardships that would be associated with uprooting her family, and given her lack of clarity about she would get out of the move, it would be a grave risk for the Trial Judge to conclude that when the time came to move and put the station on the air, Heather Cass would carry out her pledge.

166. Persons deficient in the faculty of determining values move with impetuosity into places which purely spiritual beings view with trepidation. The Trial Judge will not allow Heather Willson Cass to imitate such a deficient person. If only for those members of the public who have an understanding of and appreciation for residential architectural design work, Cass' claim for quantitative integration will be discounted.

167. Since Ms. Cass is not now and never has been a *local resident* of White City, Florida, she can claim no *civic participation*. She has absolutely no *broadcast experience*. And she is Caucasian and therefore not entitled to *minority* enhancement.

168. *Midway Broadcasting Company*. Midway premises its 100% quantitative integration claim on the full-time integration of its sole voting stockholders, Alice E. Lee. Mrs. Lee owns all 2000 shares (20% equity) of Midway voting common stock. She is also purportedly Midway's President, Treasurer, Secretary, and sole Director, although Midway has held no corporate meetings since September 1989 when they filed their application. Mrs. Lee (according to her written testimony) will work full-time (a minimum of 40 hours a week on a day-to-day basis) as the stations General Manager. In that capacity she will oversee all aspects of the station's operation, including but not limited to programming, sales and personnel.

169. Midway's quantitative 100% claim will be rejected. Midway's opponents have demonstrated that Alice Lee is nothing more than a front for Vernon Smith, a Florida banker who holds 65% of Midway's equity, and/or Larry Lee, Alice Lee's husband.

170. Vernon Smith is President and Chief Executive Officer, and a member of the Board of Riverside National Bank of Florida. He was one of the founders of the Bank in 1980, and has worked there since. He and his family have the largest single ownership interest in the bank's parent company. He is the Bank's top managing official.

171. Before September 1989 Smith discussed radio and the prospects of owning a radio station with two acquaintances who were broadcasters in the area; i.e., Robert Rowland, and Wayne Dillon. In August 1989, either Rowland or Dillon told Smith of the filing window's for new FM channels in Jupiter, White City, and Port St. Lucie. Rowland said that he couldn't pursue them because of a covenant not to compete. But Rowland gave Smith a list of several Washington attorneys that he could contact if he (Smith) was interested in pursuing these channels. An attorney who Smith uses for banking matters gave him a couple of other names.

172. Smith says he called several of the attorney's on these lists, but oddly only recalls one name -- Irving Gastfreund. The lawyers to whom Smith spoke (including Gastfreund) and Rowland explained the FCC's application process and how it works. (Tr. 2697-2698, 2704-2705, 2711, and 2727).

173. Smith was interested in the Port St. Lucie and White City Channel, but not the Jupiter Channel. He wanted to invest in a station in St. Lucie County because "you feel just more comfortable with having an investment that's closer to you than one that's far away from you." Generally, Smith has invested in business close to home.[22]

174. In his discussion with the Washington attorneys (Finding 172 *supra)*, the attorneys explained "some of the advantages or disadvantages of how to structure an application." Smith got "the impression that white non-Hispanic males were going to have a tougher time than those who are not white non-Hispanic males." (Tr. 2712-2714, 2724). Although Gastfreund represents Smith in his Port St. Lucie quest, and although Gastfreund attempted to enter an appearance on Smith's behalf in this proceeding (Tr. 2381-2425), Smith can't specifically recall the content of his discussion with Gastfreund. But he does remember that Gastfreund brought a filing deadline to his attention, probably the White City filing (Tr. 2624-2625).

175. After talking to Gastfreund, Smith approached a business associate, John Giordano, to find out if Giordano was interested in investing in either the White City or Port St. Lucie applications. *See* Finding 23 *supra*. Giordano is Executive Vice President and a member of the Officers' Loan Committee of the Riverside Bank. Smith hired him, and he reports to Smith. It is Smith who evaluates Giordano's performance.

176. Giordano was willing to make a small investment. They were both aware that preference would be awarded for minority and female involvement.[23] Giordano even arranged to have Smith and himself interview a local Black female. But after talking with her they decided not pursue the deal further. (Tr. 2730-2733).

177. Smith had known Larry Lee (*See* Finding 169 *supra)* since 1982 or 1983. Larry Lee and his father owned a citrus company which was a customer of the Riverside Bank. Since the filing deadline was imminent Smith contacted Larry Lee, and asked him if he was interested in Smith's White City FM project. Larry Lee, who *inter alia* for four years has owned a State Farm Insurance Agency,[24] told Smith "that he was totally tied up in being a State

Farm agent and he thought that maybe his wife might be interested." More specifically Larry Lee said that his wife "might be interested in doing something in addition to her school system work." (Tr. 2734-2736, 2740).

178. Larry Lee told Alice Lee about Smith's proposition on August 31, 1989 - fourteen days before Midway filed their application. At that time Alice Lee's exposure to Smith had been limited to perfunctory introductions at civic function. Mr. Lee didn't tell his wife how or why Smith had approached him. Nor did he tell her about what Smith wanted out of the deal other than he would be a partner.

179. Later that day, Larry and Alice Lee met with Vernon Smith at her husband's insurance office. The meeting lasted about one hour. Larry Lee arranged the meeting. He called Smith and participated in it by asking questions. Smith told the Lees that he had spoken to Irving Gastfreund, a communications attorney, and that Gastfreund had told him that an FM frequency was available for White City. He solicited the Lee's participation in forming an entity to apply for it (Tr. 2302-2305, 2320, 2325-2327).

180. Smith mistakenly understood that Mrs. Lee had worked for the school system as a teacher, and had been promoted to an "administrative" job.[25] He has never asked Mrs. Lee for a resume, and doesn't even know if she has one. But he does know she has never worked at a broadcast station. He didn't ask her if she had ever managed a business; he never asked the Lees for a balance sheet; and aside from assuming that Mrs. Lee made a "good living" from the school system, he doesn't know her salary.

181. Smith has gotten no assurances from Larry Lee that he will stand behind his wife financially, although he understood that Mr. Lee was generally interested in making investments (Tr. 2737-2740, 2747-2748). Mrs. Lee on the other hand, says her husband has agreed to put the Lees' joint funds into the project, and that he will personally guarantee a loan of $350,000 dollars on Midway's behalf. Any profits Mrs. Lee receives from the project will go into the Lee's joint account.

182. Mrs. Lee also believes that the reason that she and not her husband is listed as the proposed general manager is because the FCC wants the person who is running the station to work at the proposed station. She has also been aware from the outset that the female preference played a role in the decision not to have her stock in Midway owned jointly between she and her husband.

183. During the incubation meetings it was Smith (not Mrs. Lee) who provided the cost estimates for prosecution and construction. She assumes they came from Gastfreund. Smith also gave the Lees an outline of the application and the hearing process (Tr. 2316, 2330-2332, 2336). Smith also told Mrs. Lee at the first meeting that, based on Gastfreund's advice, it was important that she hold the voting interest in the applicant, and he the non- voting interest because her minority preference would be triggered only if this were the structure.

184. Smith claims he never recommended Gastfreund as legal counsel, and he never even characterized Gastfreund's qualifications. Mrs. Lee says that she knew absolutely nothing about Gastfreund but that Smith seemed to think highly of him. In any event, immediately after the first meeting she called Gastfreund and said she wanted to know more about the radio business, and what it would cost to apply for the White City station. They also discussed comparative preferences and how to structure the application (Tr. 2339-2340, 2340).

185. Gastfreund told Mrs. Lee that she and Smith should set up a two-tiered entity, preferably a corporation. But he did not explain why. It was because of Gastfreund's recommendation that Midway has been so structured. He told her that she needed to be in control of the corporation, to do all the work connected with the application (as opposed to Smith), and to formally retain Gastfreund himself. He also suggested that Ms. Lee have 20% of Midway's equity for FCC purpose. He told her that she must propose a forty hour work week.

186. At the time the Lees and Smith decided to go forward, Mrs. Lee had no documents or specific information about Smith's ability to finance the project. She simply assumed that because he was a prominent local banker, because her husband said he was a good businessman, and because he had brought the deal to the Lees, Smith could afford it (Tr. 2358-2362). But she didn't have Smith's balance sheet, and she had no specific knowledge of his business ownership interests or liabilities.

187. It was Gastfreund who suggested contacting Shaffer and Associates. So Mrs. Lee telephoned Shaffer & Associates. Mrs. Lee never even attempted to make any independent inquiries about Shaffer's abilities. She knew she needed a site consultant to find Midway's transmitter site because she didn't have either the expertise or the time (Tr. 2444-2448, 2461).

188. It was Gastfreund who recommended Fred Veihmeyer to be Midway's consulting engineer. So she called Veihmeyer. She made no effort to contact other engineers or to explore Veihmeyer's qualifications. She doesn't know if Veihmeyer is the owner of the engineering firm or an employee.

189. As a result of Gastfreund's suggestions (Findings 185, 187-188 *supra),* Mrs. Lee wrote a series of letters on September 2, 1989. She wrote Gastfreund (Findings 185 *supra),* Shaffer & Associates (Finding 187 *supra),* and Fred Veihmeyer (Finding 188). There she confirmed the prior telephone conversations; she told them, she "had formed an organization interested in obtaining an FCC licensee" for the White City channel; and she retained them to work on the application.

190. Shortly thereafter Gastfreund called Mrs. Lee. He told her he could not represent Midway after all. He had a conflict of interest. He then referred Lee to Dennis Corbett, whom he recommended highly. On September 6, 1989, Mrs. Lee called Corbett and hired him. She made no effort to check Corbett or his firm's qualifications.

191. On October 31, 1989, Veihmeyer sent his engineering bill to Lee "c/o Larry Lee, State Farm Insurance, 2209 South 25th Street, Fort Pierce, Florida." Mrs. Lee played absolutely no role in the acquisition of either Midway's first or second site. On the first site, she never met nor talked to the owner or his agent nor anyone from Shaffer & Associates. Dennis Corbert made the arrangements for the second site.

192. Lee says she worked with Midway's FCC counsel and engineer in preparing a budget for construction and operating costs. She used a "sample" budget that Corbett sent her although she didn't retain a copy. The sample budget and Lee's so-called final budget (dated September 9, 1989) both were identified on their face as budgets for a

new station in Jupiter, Florida. *See* Findings 171, 173 *supra*. She says this misidentification resulted from an error in Corbett's office.

193. Mrs. Lee never obtained or reviewed written equipment cost estimates. In fact at her deposition session she didn't know who Harris Company and Continential are. She never contacted anybody about such estimates but instead relied solely on her engineer.

194. At the hearing it developed that Midway's "sample" budget was a budget that a Richard Carrus prepared in September 1989 for a new station in Jupiter, Florida. Carrus is a client of Corbett's. The Midway and the Carrus' budgets are strikingly similar in format and substance. For example, they propose identical program, sales and managerial staffs. To the extent the equipment estimates differ, it was Midway's communications engineer that communicated equipment costs to Corbett. Mrs. Lee had no input or involvement whatsoever.

195. Veron Smith assisted Lee in obtaining the September 1989 loan letter from the Florida National Bank. She come to him in September 1989 and asked him to assist her in obtaining a loan letter. She asked for advice on what bank to go to. He recommended that she contact, Douglas Gilbert, President of that Bank. In her written testimony she states that Smith knew Gilbert. But, at the hearing she couldn't recall that Gilbert told her that he knew Gilbert. Smith says that he had known Douglas Gilbert for many years.

196. Smith accompanied Mrs. Lee to the meeting with Gilbert. He cannot say why his presence was required and that "she . . . . wanted me to be there." Mrs. Lee says that Smith accompanied her to her meeting with Gilbert "because he's a banker . . . " Lee denies that she talked to Smith about the terms of the loan before going to see Gilbert. But Smith admits that he may have looked at the draft loan letter in the car on the way to the bank. Mrs. Lee says that Smith did join in the discussion with Gilbert, but she doesn't recall what he said. Smith says he joined in the discussions with Gilbert only if Gilbert ask specific questions.

197. Mrs. Lee also recalls that Corbett and Smith discussed the loan letter in early September 1989. But she says that discussion was probably at her direction, again because Smith is a banker.

198. Mrs. Lee did establish Midway's bank account, is the sole signatory on that account, and has paid all of Midway's bills. At the hearing she first said that all of Midway's bills were paid out of that Midway account. However, it developed that five checks for Midway expenses were written on a joint account that she and her husband, Larry Lee, maintain for a rental business they own.

199. Midway got a second loan letter in May 1991. Smith and Mrs. Lee discussed whether Mrs. Lee should stay with the First Union or go to another bank. While Smith otherwise denies that he played any role in obtaining the May 1991, the record facts belie that denial. Alice and Larry Lee submitted a joint balance sheet in order to obtain the letter.

200. Alice Lee claims she has not discussed Midway's application with her husband, Larry Lee, since the September 1989 meetings. But Larry Lee has promised to provide a personal guarantee for a $350,000 loan from the First Union Bank of Florida in May, 1991 as well as promising to join in producing the $350,000 worth of liquid assests required by the May 1991 loan letter. When confronted with these post-September 1989 acts of her husband, Mrs. Lee claims that she asked her husband to sign attesting to his willingness to meet these obligations.[26]

201. The foregoing (Findings 170-200 *supra)* points inescapedly to the interim finding that Alice Lee is a mere minority front for Fort Pierce, Florida banker, Vernon Smith and/or her husband, Larry Lee. Her integration pledge must be evaluated in that light. So it is concluded that Midway's ownership lacks overall reliability, and therefore Midway will receive 0% quantitative integration.

202. Alice Lee was born on January 4, 1956. From 1979, to the present, she has *resided* in Fort Pierce; i.e., within Midway's predicted 3.16 mV/m contour. From 1979 to 1980 Mrs. Lee and her husband rented a home in Fort Pierce. White City is contiguous to Fort Pierce.

203. Mrs. Lee graduated with honors from Livingstone College in Salisbury, North Carolina in 1978. She earned a Masters of Social Work degree from the University of Georgia, in 1979.

204. From 1979-1982 she worked as a counselor in the Alpha program of the Indian River Community Mental Health Center in Fort Pierce. From 1982 to the present, she has worked as school social worker for the Department of Student Services of the St. Lucie County School Board.

205. In the past Alice and Larry Lee owned and operated a small dump truck business. They purchased and own a night club located in Georgia. From 1986-1989, Alice Lee was co-owner of LAD Bookkeeping, a partnership that provided bookkeeping services on a part-time basis. Alice Lee worked the business about six hours a week. She primarily provided bookkeeping services for her father-in-law's citrus harvesting business.

206. Alice and Larry Lee currently spend one to five hours a week overseeing certain residential and commercial property that they own jointly. They also have ownership interests in property apart from each other. She also helps out at her husband's insurance business (*See* Footnote 24 *supra).*

207. Alice Lee has been *civically active* within the predicted service area of Midway's proposed station. She is and has been an active member of Goodwill Presbyterian Church in Fort Pierce. From 1983-1984 she was Clerk of Sessions; from 1985-1990 she was a Ruling Elder; from 1986-1991 she was a member of Church Women United, and Vice-president in 1990-1991; and this year she is a member of the Deacon Board.

208. From 1982-1988 Mrs. Lee was a member of the American Federation of Teachers, AFL-CIO, Local 3616; since 1982 she has been an active Member of Alpha Kappa Alpha sorority. In 1986 she was a member of the Dress Code Committee at Fairlawn Magnet School; from 1987-1988 she was Secretary of the Fairlawn PTA.

209. From 1988-1991 she has been a member of the Girl Scouts Council-Palm Glades Chapter. During the same time period she has been on the Advisory Council at Lawnwood Elementary School. She is charter member of the Treasurer Coast Chapter of Jack and Jill, national organization involved in scholarship, social, and community activities in the proposed service area. From 1985 to 1988 and again in 1991, she has been Recording Secretary.

210. Mrs. Lee has no *broadcast experience*, but she is Black and claims the *comparative enhancement* due her minority status.

Auxiliary Power

211. All seven applicants propose auxiliary power. So this criterion will play no part in deciding this case.

Ultimate Findings And Preliminary Conclusions

1. Eight applicants are vying for a new FM station on Channel 284 in White City, Florida: (1) William F. Peel, Jr. (Peel); (2) Minority Broadcast Group Limited (Minority); (3) Karen M. Lowery (Lowery); (4) Sea Oaks Broadcasting (Sea Oaks); (5) Crystal Communications, Inc. (Crystal); (6) White City Broadcasting, Inc. (WCBI); (7) Heather Willson Cass (Cass); and (8) Midway Broadcasting Company. Only two issues need to be resolved, the standard comparative issue and the ultimate issue. *See* Finding 2 *supra*.

2. We have held our hearings and taken our evidence. One of the eight, Karen M. Lowery, has failed to properly prosecute her application. She misrepresented her ownership structure; she employed improper and evasive trial tactics; and she displayed contempt for the Commission's procedural rules. *See* Findings 6-15 *supra*. Consequently she will receive no comparative consideration, and her application will be dismissed.

3. We will analyze the remaining seven applicants under the criteria set out in the Commission's *1965 Policy Statement On Comparative Broadcast Hearings*, 1 FCC 2d 393 as modified by subsequent Review Board and Commission decisions. Pursuant to the *Policy Statement* we will address the Commission's two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

4. *Diversification of Mass Media. William F. Peel, Jr.* will be assessed a demerit of average intensity under the diversification criterion. His wife, Barbara Kay Peel, is a 34% shareholder, secretary, and director of Bennco, Inc., licensee of WDMX-FM, Vienna, West Virginia. That media interest will be attributed to William Peel. *See* Finding 21 *supra*. The record evidence shows that Barbara Peel will play an important day-to-day role in her husband's White City operation if it is granted. *See* Findings 41-43 and 48 *supra*. So her 34% interest in WDMX will be attributed to William F. Peel.

5. *WCBI* will be assessed a decisional diversification demerit. Three of its four principals have media holdings. Donald R. Jones, a WCBI Vice-President, Director and 33 1/3% stockholder is: (1) the Presiding and 50% stockholder of Turner County Broadcasting Co., the licensee of WNNC(AM), Ashburn, Georgia; and (2) the permittee of low power television stations in St. Augustine, Cocoa, Titusville, Daytona Beach, and Sebastian, Florida.

6. Leonard Walk, WCBI's President, Secretary, Treasurer, and Director and 16 2/3% stockholder is a 50% stockholder in Palm Beach Television Broadcasting, Inc. the licensee of low power television stations in West Palm Beach, and Jupiter, Florida. In addition, Walk and his wife jointly owns: (1) a 2.633% limited partnership interest in Wheeling Radio Company, the licensee of WBBD(AM) and WEGW(FM), Wheeling, West Virginia; and (2) a 1% limited partnership interest in Nittany Broadcasting Company, the licensee of WMAJ(AM) and WBHV(FM), State College, Pennsylvania.

7. *Sea Oaks* will be assessed a substantial diversification demerit. Rhonda Vega's husband, Richard Vega, owns a 49% interest in Florida. Radio Broadcasters (FRB). FRB, in turn, holds a 25% general partnership interest in Coral Cove FM partnership, the permittee of a new FM station at Coral Cove, Florida. In fact, Richard Vega is the managing partner of Coral Cove FM. In that capacity he provides technical assistance to, and is responsible for overseeing the FM station's construction.

8. The record evidence demonstrates that Richard Vega's broadcast holding should be attributed to his wife, Rhonda Vega (*See* Findings 93-118). In fact, Sea Oaks' White City FM application is actually an asset of the Richard L. Vega Group, whose leader is Richard Vega.

9. The four remaining applicants: *Minority*, *Crystal*, *Cass*, and *Midway* will offer a diffusion of control of mass communications media. They will not be assessed any diversification demerit at all.

10. So, and on balance, Minority, Crystal, Cass, and Midway are entitled to a decisional diversification advantage over WCBI, a significant diversification advantage over Sea Oaks, and a diversification advantage over William Peel.

11. *The Best Practicable Service*. We turn then to the Commission's second primary objective. In deciding which applicant will offer the best practicable service we may have to consider all four basic criterion: (1) We will decide whether any applicant should be preferred because of a superior areas and coverage proposal (comparative coverage); (2) we will look at the extent each applicant will their ownership into the proposal station's day-to-day management (quantitative integration); (3) We may have to look at the attributes that each integrated owner will bring to that day-to-day management (qualitative integration); and (4) we may have to consider the degree that the quantitative and qualitative integration is enhanced by minority ownership.

12. If it becomes necessary to evaluate the third criterion, qualitative integration, we will look at such factors as local residence, participation in civic affairs, past education, and business experience, and past broadcast experience.[27]

13. *Criterion 1: Comparative Coverage*. Minority, Midway, Sea Oaks, and Crystal propose to serve between 15,592 (12%) and 21,683 (16%) more people than Peel, WCBI, and Cass. That entitles Minority, Midway, Sea Oaks and Cass to a *very slight preference* over Peel, WCBI and Cass. The differences between Peel, WCBI, and Cass are too insubstantial to warrant any preference *inter sese*.

14. No one is entitled to a comparative preference for proposing service to underserved areas. The differences in the fifth nighttime service are less than 100 people. That's insignificant.

15. *Criterion 2: Quantitative Integration*. First, *WCBI* will be eliminated under this criterion. They make no claim for quantitative integration. So they will be awarded 0% quantitative integration. When this *0 % claim* is added to WCBI's *decisional* diversification demerit (*See* Conclusions 5, 6 and (10 *supra)*, and their *slightly deficient* engineering proposal, it's clear that WCBI is a comparative loser. No useful purpose would be served by analyzing WCBI's proposal any further.

16. The other six applicants all claim 100% quantitative integration. But only one of the six, *Crystal*, has sustained its claim. *William F. Peel, Jr.* has failed to demonstrate that

overall his integration pledge is reliable. His other financial and time commitments to his other four businesses makes his pledge to move to White City and devote 40 hours a week to being General Manager of the FM station ring hallow. He is awarded 0% quantitative integration. *See* Findings 40-57 *supra*. When Peel's lack of quantitative integration is combined with the diversification demerit assigned Peel (*See* Conclusions 4 *supra*), it is obvious that Peel is no longer a factor in the comparative race.

17. Similarly, *Minority* has failed to establish the overall reliability of April Wortham's integration pledge. Wortham, purportedly Minority's sole General Partner, does not now and never has controlled the formation and prosecution of Minority's White City FM proposal. Rather, the driving force behind Minority's White City application is a person not listed on the application, communications consultant Ken Dawson.

18. The record evidence shows that Ken Dawson is the architect behind three "cookie-cutter" FM applications for three Florida east coast resort communities: White City, Port St. Lucie and Jupiter. Since Wortham is merely a front for Dawson, Minority will be awarded 0% quantitative integration. (*See* Findings 60-88 *supra*).

19. *Sea Oaks* will also be awarded 0% quantitative integration. Rhonda Vega is not the true Sea Oaks applicant. The real applicant behind BPH-890914MD is the Richard L. Vega Group. The Richard L. Vega Group, a broadcast engineering consulting firm, is headed by Rhonda Vega's husband, Richard L. Vega. Since Rhonda Vega is nothing more than a front for the Richard L. Vega Group they will be credited with 0%. (*See* Findings 93-118 *supra*). When Sea Oaks' lack of quantitative integration is combined with the diversification demerit they have been assigned (*See* Conclusions 7-8 *supra*), it is obvious that Sea Oaks is no longer a factor in the comparative race.

20. *Heather Willson Cass* will be awarded 0% quantitative integration. She has failed to persuade the forum that she'll fulfill her integration pledge. Given her years of training for and dedication to her successful career (architecture), given the personal hardships that would be associated with uprooting her and her family, and given her lack of clarity of what she would gain from the move, the Trial Judge cannot concluded that Heather Willson Cass will relocate from Washington, D.C. to White City, Florida if her application is granted (*See* Findings 152-166 *supra*).

21. *Midway* will be awarded 0% quantitative integration credit. Their opponents have demonstrated that the purported control person, Alice Lee (20% equity) is nothing more than a front for Vernon Smith (65% equity), a Florida banker, and/or Larry Lee, her husband (*See* Findings 169-201).

22. As previously noted *Crystal* is the only applicant to sustain its 100% quantitative integration pledge (*See* Conclusion 16 *supra*). Barbara Marshall, Crystal's sole voting shareholders has affirmatively demonstrated that she has formulated and prosecuted Crystal's application; that she is aware of her duties and responsibilities as the sole voting shareholder; and that she is ready, willing, and able to carry out those responsibilities (*See* Findings 124-141, and 143-151 *supra*).

23. Crystal's opponents argue that William Murray, the acknowledged leader of the non-voting stockholders, is not legally prohibited from becoming a Crystal employee or consultant. That argument is highly questionable. But, in any event, William Murray says "I can't do that and I don't want to do that, and I won't do it" (*See* Finding 142 *supra*). That unrebutted testimony will be credited.

24. It's true that William Murray, at Barbara Marshall's request, obtained Crystal's loan letter. (*See* Findings 148-151 *supra*). But examination of all the circumstance leading to William Murray's participation in the prosecution of Crystal's application does not, standing alone, vitiate his passive status. The conclusion is nevertheless justified that Barbara Marshall is no mere front for the non-voting stockholders, and her claim for 100% quantitative integration will be granted.

25. Based on the foregoing (Conclusions 15-24 *supra*), it's apparent that the quantitative integration criterion is decisional. Crystal has sustained its claim to 100% quantitative integration; WCBI, Peel, Minority, Sea Oaks, Cass and Midway have not.

Ultimate Conclusions

26. Since Crystal has been awarded 100% quantitative integration, while the others have been awarded 0%, there is no need to consider either qualitative integration or minority enhancement.[28,29] Crystal is declared the comparative winner. *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.* 93 FCC 2d 643, (R. Bd 1989) at 649. It is Crystal that will offer the best practicable service to the public in White City, Florida and vicinity. SO unless an appeal is taken from this Initial Decision of the Commission reviews it on their own motion, Karen M. Lowery's application (BPH-890914MU) IS DISMISSED; William F. Peel, Jr.'s application (BPH-890906MM), Minority Broadcasting Group Limited's application (BPH-890914MT), Sea Oaks Broadcasting's application (BPH-890914MD), White City Broadcasting, Inc.'s application (BPH-890914NP), Heather Willson Cass's application (BPH-890914NW), and Midway Broadcasting Company's application (BPH-890914OD) ARE DENIED; and Crystal Communications, Inc.'s application (BPH-890914NF) IS GRANTED subject to the outcome of MM Docket 88-366.[30]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] The following nine applicants were dismissed: (1) James H. Hummel (BPH-890914NY) on May 21, 1991 (FCC 91M-1679); (2) Mystic Radio Corporation (BPH-890914MH) on June 3, 1991 (FCC 91M-1784); (3) Capestancy Broadcasting Limited Partnership (BPH-890913ME) on June 13, 1991 (FCC 91M-1884); (4) Lucille Ann Lacy (BPH-890914OG) on June 13, 1991 (FCC 91M-1884); (5) Sage Broadcasting Corporation of Fort Pierce, Florida (BPH-890912ME) on June 18, 1991 (FCC 91M-1915); (6) Sam Idas (BPH-890913MM) on June 18, 1991 (FCC 91M-1915); (7) White City Radio Partner (BPH-890914NJ) on June 18, 1991 (FCC

91M-1915); (Coastal Broadcasting Corporation (BPH-890914NH) on August 8, 1991 (FCC 91M-2459); and (9) Q Prime, Inc. (BPH-890914NV) on November 26, 1991 (FCC 91M-3337).

[2] For the purposes of organization and clarity, these issues have been renumbered. *See* 56 F.R. 22430 published May 15, 1991.

[3] The Chief has also ordered "[t]hat any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of MM Docket 88-366." *See* 56 F.R. 22430 *supra* at paras. 2 and 12.

[4] As is customary the Bureau only addressed the comparative coverage issue (Finding 3 *supra).*

[5] This case was designated for hearing on May 9, 1991. *See* 56 F.R. 22430 published May 15, 1991; we held the prehearing conference on August 28, 1991; and the hearings started on September 10, 1991. So Minority's ownership structure was not legally firmed up until over 2 years after Minority certified that it was.

[6] Represented by the same communications counsel, William B. Murray was a 71% owner of ProCom, the successful FM applicant in the Boston RKO proceeding. *See* FCC 86D-47 released July 23, 1986. Although he pledged to devote at least 40 hours a week to being General Manager of the station. Nothing ever came of that pledge. ProCom sold out for a handsome dollar figure. *See* Cass' P.F. 137.

[7] Also see Minority's Petition for Leave to Amend filed on December 2, 1991, and FCC 91M-3485 released December 23, 1991.

[8] It is geographically impossible for the Sanibel property to be either a Tampa or Orlando office.

[9] In all probability Lauren Colby either recommended or (at Peel's recommendation) hired Bill Benz III.

[10] Peel hadn't shown due diligence in amending; accepting the amendment would have required adding two issues to the proceeding; and accepting the amendment would unfairly prejudice the other applicants.

[11] Many of Ken Dawson's efforts to distance himself from the preparation and prosecution of the Minority's application border on the incredible.

[12] April Wortham previously was an applicant for an FM station at Oxford, Mississippi. Even though she was an apparent comparative choice in that proceeding, under a settlement agreement she dismissed her application for apparently a tidy profit. So Ms. Wortham is no stranger to the Commission's settlement procedures.

[13] Rhonda Vega, at one time, also had FM applications prepared and filed for Beverly Hills and Tice, Florida. *See* Finding 111 *infra.*

[14] This response of Rhonda Vega makes no sense.

[15] Although Sea Oaks filed its application of September 4, 1989, Rhonda Vega did not discover that the public inspection file had not been established and the local notice had not been published until March 1991 (Lowery Ex. 14; Tr. 1100, 1174-1175).

[16] It is not at all clear how Rhonda Vega's ownership and administrative status described at Findings 94-96 *supra* coincide (if they coincide) with the independent communication consulting activities) she describes above.

[17] Vincent Vega (Findings 97, 101, 105, 107, 110, 111 and 115 *supra)* is not aware that Rhonda Vega performed any functions for the Vega Group. He says that in 1989 Mrs. Vega was a student and may have had a study area or an office on the premises of the Richard L. Vega Group (Tr. 933).

[18] Ms. Marshall understands that, as the sole voting stockholder, director, and officer, she will exclusively manage and control Crystal and its proposed station.

[19] Based on facts provided him in several proceedings (*e.g.* the *Mableton, Georgia,* and the *Southern Pines, North Carolina* proceedings), the Trial Judge believes there are demographic areas in this country where the loan approval process takes longer for Blacks and even longer for Black females. However, the record does not reflect whether this was the type of delay Barbara Marshall faced.

[20] Marshall used a model budget that Weiss sent her. With Paul Wolf's assistance she prepared estimates based on experience at station's where she had worked, and equipment cost estimates she'd obtained from Harris.

[21] William Murray has been Crystal's counsel client in other contexts. He was instrumental in persuading Richard Houlding, and his brother John Murray is the tact leader of the non-voting stockholders. But that is a different topic altogether, and has no bearing on Barbara Marshall's independence on the tack thereof.

[22] *See* Finding 33 *supra.*

[23] At that time female preferences were still being awarded.

[24] Alice Lee helps her husband in her insurance business. She makes bank deposits, sends out cards to customers, interviews prospective employees, answers phones and at one time made sales calls. Her husband doesn't pay her a salary.

[25] Since 1982 Alice Lee has been employed by the St. Lucie County School Board as one of ten School Social Workers in the Department of Student Services. She is responsible for students at four schools. During her entire term of employment there have been no changes in her overall responsibilities. Those responsibilities are neither supervisory or managerial, and include only counseling, parent conferences, and completion of student histories. So Smith, the 65% equity holder, doesn't even know the factual background of the person he has recruited as Midway's voting stockholder.

[26] As previously noted (Finding 33 *supra)* Vernon Smith also owns an 80% equity interest (non-voting stock) in Horton Broadcasting Inc., an FM applicant for adjacent Port St. Lucie. After the Midway application was filed, Smith asked Larry Lee if he could recommend a minority who lived in Port St. Lucie and an applicant. Smith says he asked Larry Lee and not Alice Lee because he had a "closer relationship" with him. Mr. Lee said he knew of someone, and a few days later Lee called Smith back and gave him Helen Horton's name and telephone number. Alice Lee didn't know her husband made this referral. Helen Horton owns 20% equity (voting stock) in Horton Broadcasting, and is a long-time friend of Alice Lee's.

[27] There is no need in this case to evaluate auxiliary power. *See* Finding 211 *supra.*

[28] Note however that qualitative integration findings and minority enhancement findings have been made. *See* Findings 58-59, 89-92, 119-123, 126- 137, 167, and 202-210 *supra.* So if the appellate body disagrees with the quantitative integration analysis, no remand will be needed.

[29] Although Criterion 2, Quantitative Integration, has proven dispositive, this doesn't mean that Crystal is qualitatively inferior, or lacks minority enhancements. Crystal's Barbara Marshall is a local resident with broadcast experience who has participated civically within the proposed service area, and she's Black.

[30] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on their motion, this Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-357

In re Applications of

CHRISTIAN FAMILY CINEMA, INC. File No. BPED-890410MD

For Construction Permit for a
New Noncommercial Educational
FM Station, Channel 220A,
Crystal River, Florida

SONLIGHT PUBLIC BROADCASTING NETWORK, INC. File No. BPED-890531ME

For Construction Permit for a
New Noncommercial Educational
FM Station, Channel 220A,
Homosassa Springs, Florida

Appearances

Lawrence W. Walls, Pro Se on behalf of Sonlight Public Broadcasting Network, Inc.; *John B. Kenkel, Esq.* and *Scott Cinnamon, Esq.* on behalf of Christian Family, Inc.; *Charles Dziedzic, Esq., Y. Paulette Laden, Esq.* and *Gary P. Schonman, Esq.* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF
ADMINISTRATIVE LAW JUDGE
RICHARD L. SIPPEL

Issued: May 20, 1992; Released: May 29, 1992

PRELIMINARY STATEMENT

1. This is a ruling on a Motion For Summary Decision that was filed by Christian Family Cinema, Inc. ("Family") on March 24, 1992. Also under consideration are a related Petition For Leave To Amend filed by Family on March 25, 1992, and a Supplement To Amendment filed by Family on April 9, 1992.[1]

2. A related Joint Petition For Approval Of Settlement And Section 73.3525(b) Showing was filed on March 25, 1992, by Family and the dismissing applicant, Sonlight Public Broadcasting Network, Inc. ("Sonlight"). A Supplement To Joint Petition For Approval Of Settlement was filed by Family and Sonlight on March 30, 1992.

3. On April 30, 1992, the Mass Media Bureau ("Bureau") filed its Consolidated Comments On Joint Petition For Approval Of Settlement, Petition For Leave To Amend, Supplement To Joint Petition, Supplement To Amendment And Motion For Summary Decision ("Comments").

FINDINGS OF FACT

4. This proceeding was commenced on November 25, 1991, by the adoption of *Hearing Designation Order* DA 91-1479 ("*HDO*"), reported as *SHOWEM, Inc, et al.*, 6 F.C.C. Rcd 7364 (MM Bur. 1991), released December 17, 1991. Issues were set in the *HDO* to determine: (1) whether Family's tower site presented a hazard to air navigation; (2) whether Family's status qualified as an educational organization under 47 C.F.R. §73.503(a); (3) whether a share-time arrangement would be appropriate and in the public interest; (4) and if a comparative decision is not made based upon §307(b), the extent that each proposal will be integrated into cultural and educational objectives and whether other factors demonstrate that one applicant will provide a superior FM educational broadcast service. *HDO* at ¶ 9.

5. On January 15, 1992, Family filed a corrective Amendment that accurately reflected the data base for its proposed tower height. The Amendment was required under the *HDO*, no objection was interposed by the Bureau, and it was accepted by the Presiding Judge. *See Order* FCC 92M-152, released February 4, 1992.

6. Former party SHOWEM, Inc. ("SHOWEM") was an applicant for a major modification of its FM station at Port Richey, Florida. Its application was set for hearing with the applications of Family and Sonlight because of a mutual exclusivity with Sonlight's engineering proposal. On January 30, 1992, SHOWEM filed an engineering amendment to provide for a modification to achieve a wider coverage and to eliminate the mutual exclusivity. The Bureau agreed with SHOWEM's technical analysis and had no objection to an immediate grant. In a ruling issued on February 11, 1992, the Presiding Judge granted SHOWEM's application for a CP to make its major modification and dismissed SHOWEM as a party to this case. *See Memorandum Opinion and Order*, FCC 92M-196, released February 12, 1992.

7. Family's proposed engineering amendment addresses the air hazard issue. The amendment is considered under the circumstance of a pending settlement proposal that would result in a grant to Family and the dismissal of Sonlight's application. Sonlight's engineering has been accepted by the Bureau and is not subject to an air hazard issue. Therefore, Family now seeks to amend to Sonlight's site. The acceptance of the Amendment is a necessary condition to approving the settlement.[2] The Bureau supports the position that the Amendment be accepted.

8. The amendment also addresses the basic qualifying issue of whether Family is an educational organization. In the proposed programming schedule of its application, Family had asserted that it would ". . . work closely with the leaders of the community in the area of religion, civics and education" but its programming schedule "appeared to be devoid of any educational programming." The Bureau was not satisfied with that disclosure. *See HDO* at ¶ 4. In the proposed amendment, Family offers a further explanation of the programming to be offered. It represents that programming will include each weekday four hours of educational and instructional programming, one and one-half hours of news and one hour and forty minutes of religious informational/instructional programming. On

Saturdays, there will be five minutes of news every hour and time for a "community bulletin board" style segment. Sunday will feature five minutes of news every hour as well. That disclosure was further supplemented on April 9, 1992 in Family's Supplement To Amendment which discloses in line item detail the objectives of Family's broadcasting (educational, spiritual and cultural) and a proposed program schedule. The Bureau concurs that the new disclosure meets Commission standards.

9. The Joint Petition that seeks approval of the settlement includes facts relating to the §307(b) issue. Family's city of license is Crystal River, Florida and Sonlight's is Homosassa Springs, Florida. Neither Crystal River nor Homosassa Springs has any other licensed station operating on a reserved FM channel. Therefore, both applicants are proposing the first noncommercial service in the two respective communities.

10. Family's initial proposal would provide service to 39,511 people in a 420 square mile area. Sonlight's proposal would provide new service to 61,768 people over an area of 1,827 square kilometer. With Family's amendment, both proposals specify the same tower site. Both proposals would serve the cities of Crystal River and Homosassa Springs, *i.e* both cities are within the 60 dbu contours of both proposals. Family, in attempting to avoid a hearing, initially proposed a directional antenna pattern that would have allowed an amendment proposed by licensee SHOWEM, Inc. to be granted along with the Family application. Sonlight proposed a non-directional pattern from the same site which would serve about 50% more in both area and population. In recognition of the fact that Sonlight's engineering would be the better proposal, Family has made acceptance of its amendment adopting Sonlight's engineering proposal a condition of the settlement.

11. The Agreement contemplates that Sonlight will dismiss its application with prejudice in return for a payment of $2,100 by Family, contingent upon the grant of Family's engineering amendment to move to Sonlight's site. The money payment represents Sonlight's engineering, travel, telephone and postage expenses. Sonlight is not represented by legal counsel and therefore there are no legal fees involved in the payment.

CONCLUSIONS OF LAW

12. The Commission's rules provide that in considering a motion for summary decision:

> The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or by other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing.

47 C.F.R. §1.251(a)(1). As the moving party, Family has the burden of establishing that summary decision would be appropriate based on its papers. *Summary Decision Procedures*, 34 F.C.C. 2d 485, 487-88 (1972). For reasons stated below, it is concluded that Family has met its burden.

13. Crystal River and Homosassa are within the 60 dbu contours of both proposals. The Sonlight engineering proposal, which Family would adopt under its Amendment, provides greater population coverage. The legal issue to determine here is whether the withdrawal of Sonlight would "unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities." 47 C.F.R. §73-3525(b)(1). Neither Crystal River nor Homosassa Springs has any other noncommercial frequency that is either operating or allocated. And while both proposals have the capacity to represent a first noncommercial transmission service, the community specified by Family, i.e., Crystal River, is the larger community. And since dismissal of the Sonlight application would moot the §307(b) issue, it is not necessary to find in this ruling that the preferred community will receive the grant.

14. A condition precedent to granting summary decision is the acceptance of Family's engineering amendment. There is clear public interest for its acceptance. The engineering in the amendment provides superior coverage in the greater populated city of license and the acceptance of the amendment will bring on line through settlement, and without further litigation, the community's first noncommercial broadcasting. This would result in the earliest possible receipt of a first coverage.

15. In addition, the engineering amendment meets the Commission's "good cause" test that is required for an engineering amendment that is sought 30 days after issuance of the HDO. 47 C.F.R. §73.3522(b). The engineering amendment is required to meet a qualifying air hazard issue and therefore is not a voluntary change. Also, the amendment does not require an enlargement of the issues or the addition of new parties. The Commission's rule has been met. *See* 47 C.F.R. §73.3522(b)(i) and (ii). Family also acted with diligence to effect the amendment, the proposed amendment would advance the resolution of this case rather than disrupt it, no party is disadvantaged by its acceptance, and no party gains a comparative advantage. *See Edwin O' Connor Broadcasting Co.*, 22 F.C.C. 2d 140, 143 (Review Bd 1970), cited more recently in *Eugene Walton*, 6 F.C.C. Rcd 6071, 6072 (Review Bd 1991). For these reasons, the Amendment will be accepted based on the public interest and the showing of good cause by Family.

16. Also relevant to summary decision is whether the settlement would "unduly impede" §307(b) in which case there would be a requirement for republication. *See* 47 C.F.R. §73.3525(b)(1) and (2). *See also Lauderdale Broadcast, Inc.*, 20 F.C.C. 2d 498, 504 (Comm'n 1969). From the above analysis under the §307(b) issue,[3] it is found as a matter of law that §307(b) would not be "unduly impeded" in the award to Family and the dismissal of Sonlight because both communities will receive the service and Family will provide the broadest coverage. For as noted above, under the settlement, both communities will receive the new service and the largest population receives the widest new noncommercial coverage with the amendment. That outcome is consistent with and does not impede the policy behind §307(b) to foster a fair, efficient and equitable distribution of radio service.

17. Summary decision in favor of Family is also appropriate under the air hazard issue. The air hazard issue was based upon engineering relating to Family's prior site. There was no air hazard issue set with respect to Sonlight's site which is the site where Family will erect its tower under the settlement and the engineering amendment. The Bureau supports favorable summary decision on this issue for that reason. *See* Bureau Comments at 4. It will be granted.

18. Summary decision in favor of Family is also appropriate under the education qualification issue. As indicated in the *HDO*, Family's programming statement was insufficient to make a determination on whether the applicant is a qualified educational organization. Family has filed an Amendment which expands its description sufficiently to meet the Commission standard. *See Moody Bible Institute of Chicago*, 66 F.C.C. 2d 162 (Comm'n 1977). Family has proposed, *inter alia*, to present more than 28 hours of general educational programming each week out of a total of 112 broadcast hours. *See* Supplement To Amendment at numbered page 07. The Commission has held that programming need not be exclusively educational. *Lower Cape Communications, Inc.*, 47 Radio Reg. 2d (P&F) 1577 (Comm'n 1980). In addition to specifically identified educational programming, Family also will broadcast 15 1/2 hours of religious education programming which will qualify as educational. *See Way Of The Cross Of Utah, Inc.*, 58 Radio Reg. 2d (P&F) 455, 457 n. 5 (Comm'n 1985). The Bureau supports favorable summary decision on this issue. *See* Bureau Comments at 4. It also will be granted.

19. The settlement meets the standards for acceptance. The amount of the payment, $2,100, represents only legitimate and prudent expenses. *See Settlement Agreements Among Applicants For Construction Permits*, 6 F.C.C. Rcd 85 (1991), *modified* 6 F.C.C. Rcd 2901 (1991). The statutory standard to be applied in accepting or rejecting a settlement proposal provides:

> The Commission shall approve the agreement only if it determines that (a) the agreement is consistent with the public interest, convenience or necessity, and (b) no party to the agreement filed its application for the purpose of reaching or carrying out such agreement.

Communications Act of 1934, as amended, §311(c)(3). *See Oak Television of Everett, Inc., et al.*, 93 F.C.C. 2d 926, 52 Radio Reg. 2d (P&F) 995 (Review Bd. 1983).

20. In this case, the Joint Request was filed timely in accordance with §73.3525. The parties have represented under penalty of perjury that their applications were not filed for the purpose of reaching or carrying out a settlement agreement and that the agreement is in the public interest. Therefore, it is determined that the parties have complied with §73.3525(a)(1) and (a)(2) of the Commission's rules. Also, the Bureau has no objection to approving the settlement and Commission resources will be conserved by the termination of this case prior to hearing. In addition, the public interest will be served by approval of this agreement which will eliminate the need for protracted litigation and the corresponding utilization of resources, and which ensures that a new FM noncommercial service will be delivered at an earlier date.

RULINGS

IT IS ORDERED that the Petition For Leave To Amend filed on March 25, 1992, by Christian Family Cinema, Inc., as supplemented on April 9, 1992, IS GRANTED and the Amendment IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion For Summary Decision filed by Christian Family, Inc. on March 24, 1992 IS GRANTED and the air hazard issue and the educational qualification issue ARE RESOLVED in the applicant's favor.

IT IS FURTHER ORDERED that the Joint Petition For Approval Of Settlement filed on March 25, 1992, by Christian Family Cinema, Inc. and Sonlight Public Broadcasting Network, Inc. IS GRANTED and the Settlement IS ACCEPTED.

IT IS FURTHER ORDERED that the application of Sonlight Public Broadcasting Network, Inc. (File No. BPED-890531ME) IS DISMISSED with prejudice.

IT IS FURTHER ORDERED that the application of Christian Family Cinema, Inc. (File No. BPED-890410MD) to construct a new noncommercial FM Station on Channel 220A at Crystal River, Florida IS GRANTED.[4]

FEDERAL COMMUNICATIONS COMMISSION

Richard L. Sippel
Administrative Law Judge

FOOTNOTES

[1] Action on those pleadings was deferred pending receipt of universal Comments from the Mass Media Bureau on all pleadings related to settlement, engineering amendment, and summary decision. *See* FCC 92M-452, released April 14, 1992.

[2] The parties were negotiating a settlement in early February and were prepared to present the matter to a Settlement Judge. *See Order* FCC 92M-214, released February 18, 1992. The parties represent that pursuant to the Presiding Judge's *Order* of February 5, 1992 (FCC 92M-154) they had a face-to-face meeting on February 11, 1992. Those discussions continued until an agreement was signed on February 18, 1992. Since a settlement had been reached in principal shortly after the request and before it was acted upon by the Chief Judge, the request for a Settlement Judge became moot. *See Order* FCC 92M-276, released March 4, 1992.

[3] The Bureau notes that "technically, resolution of that [§307(b)] issue is not necessary, because dismissal of the remaining competing application would moot any comparison of the respective communities under Section §307(b)." *See* Comment at 3 n.1. The Bureau is correct. But the policy of §307(b) must not be unduly impeded by a settlement. Therefore, some overlapping §307(b) analysis is relevant to deciding whether there is a public interest in accepting the settlement in this case. The §307(b) analysis does not need to involve a showing of a community's distinctiveness or relative significance as would be required to award a preference. *Beacon Broadcasting*, 2 F.C.C. Rcd 3469, 3472 n.6 (Comm'n 1987), *aff'd sub nom. New South Broadcasting* Corp. v. F.C.C., _____ F.2d _____ (D.C. Cir July 7, 1989). The rule provides that where a settlement is shown to "unduly impede" §307(b)'s policy under a proposed dismissal, the case must be republished to invite new parties who might advance §307(b). *See* 47 C.F.R. §73.3525(b)(1) and (2). Therefore, it is relevant to show that the city with the largest population receives the grant, that the signal covers both communities, and that a larger area and population base will be served by an award to Family.

[4] This *Summary Decision* disposes of the case in its entirety. It shall become effective 50 days after its public release if exceptions are not filed within 30 days thereafter, unless the Commission elects to review the case on its own motion. 47 C.F.R. §1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-201

In re Applications of

SCOTT M. TRENTADUE File No. BPH-900604MA

FREDERICK W. KINLOW File No. BPH-900606MF
d/b/a F.W.K.
BROADCASTING COMPANY

For Construction Permit for a
New FM Station on Channel 293A,
Whitewater, Wisconsin

ORDER

Adopted: May 19, 1992; Released: May 29, 1992

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE

1. Before the Review Board is the Appeal by Frederick W. Kinlow d/b/a F.W.K. Broadcasting Company (FWK) of the *Memorandum Opinion and Order* of Administrative Law Judge Joseph Chachkin, FCC 92M-432 (Released April 6, 1992), which dismissed the application of FWK, granted the application of Scott M. Trentadue, and dismissed the Joint Request for Approval of Settlement Agreement as moot. This appeal is brought pursuant to 47 C.F.R. § 1.302. Scott M. Trentadue has filed Comments on Appeal suggesting that the Board certify the question to the Commission.

2. FWK's application for a new Whitewater, Wisconsin, FM station was subject to the Commission rules establishing new deadlines for tendering hearing fees. Because it was unaware of the change, FWK did not tender its fee until after the deadline passed. The late-tendered fee was accepted by the ALJ, *Memorandum Opinion and Order*, FCC 91M-2682 (ALJ, released August 30, 1991). When this ruling was appealed to the Review Board, the Board referred it to the Managing Director. *Memorandum Opinion and Order*, 6 FCC Rcd 6540 (1991). Shortly thereafter, the parties entered into a settlement agreement whereby Trentadue would dismiss his application and FWK's application would be granted. The ALJ deferred action on the request to approve the settlement agreement while the appeal of his fee ruling was pending. When the Managing Director denied FWK's request for the late acceptance of its hearing fee, *see Public Notice, Fee Decisions of the Managing Director Available to the Public*, 7 FCC Rcd 2414 (1992), the ALJ dismissed FWK's application and granted the pending application of Trentadue. FWK has applied for review of the Managing Director's ruling and argues here that the ALJ's dismissal of its application and the settlement agreement is premature in light of the pendency of its application for review.

3. Given the above facts, we will hold Board action on FWK's appeal of the ALJ's order in abeyance pending Commission action on FWK's application for review. The Managing Director's action on the fee issue was central to the ALJ's ruling that was appealed to the Board. Thus, in this case, no public interest purpose would be served by Board action until the Commission resolves the fee question.

4. ACCORDINGLY, IT IS ORDERED That the Appeal of F.W.K. Broadcasting Company filed May 5, 1992, IS HELD IN ABEYANCE pending Commission action on the Application for Review filed by F.W.K. Broadcasting Company on May 5, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 22, 1992

REQUESTS FOR EXTENSION OF TIME IN ADJUDICATORY CASES WILL NOT BE ROUTINELY GRANTED

Under 47 C.F.R. § 1.45(a), it is the policy of the Commission that extensions of time shall not be routinely granted. Moreover, the Commission recently indicated that requests for extension of time should be closely examined to determine whether they are based on a clear showing of good cause. *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 172 n.34 (1991). The Office of General Counsel accordingly reminds all parties to adjudicatory proceedings that requests for extension of time will not be routinely granted.

For further information, contact John Riffer, Adjudication Division, Office of General Counsel, at (202) 632-7220.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RAMAR COMMUNICATIONS, INC.
(Assignee)

and

MARY MORAN File No. BAPCT-911226KF
(Assignor)

For consent to the assignment
of the construction permit
of unbuilt station KBQE(TV),
Albuquerque, New Mexico

and

GUADALAJARA CHILI PEPPER COMPANY File No. BALH-911226HV
(Assignor)

For consent to the assignment
of the license of station KIDI(FM),
Albuquerque, New Mexico

ORDER

Adopted: May 18, 1992; Released: May 19, 1992

By the Commission:

1. The Commission has before it for consideration the above-captioned applications for consent to a two-part transaction involving Ramar Communications, Inc. (Ramar). The first component of the transaction concerns the gratis intrafamilial assignment of the construction permit for unbuilt television broadcast station KBQE(TV), Albuquerque, New Mexico,[1] from Mary Moran (Moran) to Ramar; Moran is an officer and director of the assignee, which is controlled by her husband Ray Moran. The second part of the transaction involves the assignment to Ramar of the license of station KIDI(FM), Albuquerque, from Guadalajara Chili Pepper Company (Guadalajara). Because Section 73.3555(b) of the Commission's Rules generally prohibits common ownership of radio and television stations in the same community, Ramar has requested that the Commission waive the rule's prohibition. The applications are unopposed.

2. In the *Second Report and Order* in MM Docket No. 87-7 (*Second Report and Order*), 4 FCC Rcd 1741, *recon. denied in part and granted in part*, 4 FCC Rcd 6489 (1989), the Commission adopted a revised standard for cases dealing with waivers of Section 73.3555(b). The Commission indicated that it would look favorably upon waiver applications involving stations in the top 25 television markets if at least 30 separately owned, operated, and controlled broadcast licensees or "voices" would remain after the acquisition. *Id.* at 1741. The Commission also stated that it would look with similar favor on waiver requests involving "failed" broadcast stations; that is, stations that have not been operating for a substantial period of time or are involved in bankruptcy proceedings. Beyond these two circumstances, the *Second Report and Order* concluded that waiver applications would be considered on a case-by-case basis and evaluated using five public interest criteria: (1) the potential benefits of joint operation of the facilities; (2) the types of facilities involved (*e.g.*, VHF or UHF, AM or FM); (3) the number of media outlets already owned by the applicant in the relevant market; (4) any financial difficulties experienced by the stations involved; and (5) the nature of the market; that is, the level of competition and diversity, based on both broadcast and other media voices, after the requested joint operation is implemented. These factors would be weighed to determine whether, in a given case, the potential benefits of combined facilities can be obtained without undermining the public interest in diversity and economic competition in communications markets. Because Albuquerque, New Mexico, is the 52nd ranked television Area of Dominant Influence (ADI)[2] and because neither KBQE(TV) nor KIDI(FM) qualifies as a failed station, Ramar's waiver request is subject to review under the case-by-case standard, pursuant to the five public interest criteria.

3. With regard to the first criteria, Ramar asserts that common ownership of the two stations will allow cost savings in purchasing and leasing facilities, and will allow the stations to share equipment, utilities, and services. Specifically, the applicant estimates that each year it will save $17,400 in studio rent and utilities, $8,400 in cleaning service, $15,600 in newswire service, and $6,000 in telephone service. Also, because Ramar plans to have the stations ultimately broadcast from the same tower, it estimates that it will save $13,200 in transmitter and antenna rental space. Moreover, because the applicant plans to have the stations share most personnel, it estimates an annual savings of $318,300 in personnel costs. Ramar further estimates annual savings of $24,000 in legal and accounting services and $1,736 in insurance costs. Additionally, the assignee predicts that substantial cross-promotion between the stations will lead to additional savings. Ramar also claims that the savings produced by these economies of scale will permit greatly expanded local news service at the radio station, as well as programming at both stations focusing on local and state politics, benefitting the public interest.

4. The second criterion addresses the nature of the stations involved in the waiver request. In that regard, we note that the permit for KBQE(TV) specifies a UHF (channel 50) facility which will operate with 1450 kW ERP, visual, and an HAAT (height above average terrain) of 1266 meters; it will be a substantial but not maximum facility. Its predicted Grade B contour will cover an area

[1] The construction permit was issued on June 14, 1991, and it expires on July 1, 1993.
[2] *Arbitron Television Markets and Rankings Guide*, 1990-1991.

of 42,271 square km, and a population of 692,663 people. The license for KIDI(FM) specifies a class C FM station (the class with the highest power available for an FM station) operating at 103.3 MHz with an ERP of 20.0 kW H & V and an HAAT of 1276 meters H & V. In addition, Ramar states that KIDI(FM)'s share in the Albuquerque metro market was only 1.8, according to the Fall, 1991 Arbitron radio survey.

5. The third criterion deals with the number of media outlets already owned by the applicant in the relevant market. Neither Ramar nor its principals have an interest in any other full power broadcast media outlet in the relevant area.[3]

6. The fourth public interest criterion is concerned with the financial difficulties of the station or stations in question and whether and for how long the station has been offered for sale. The applicant asserts that KIDI(FM) has operated at a net loss during every year of its existence, beginning in 1988; specifically, Ramar submits figures stating that the radio station lost approximately $92,000 in 1989, $59,000 in 1990, and $78,000 in 1991. The assignee claims that a similar financial struggle awaits KBQE(TV), which will be the ninth television station (and seventh commercial television station) licensed to Albuquerque, which already supports three commercial and one noncommercial VHF stations. Therefore, Ramar maintains, the economic efficiencies caused by joint ownership of the two stations may be essential to their continued viability.

7. In addition, Guadalajara states that it attempted to sell KIDI(FM) for two years before reaching an agreement to assign the station to Ramar. The seller asserts that it placed advertisements in a trade magazine to find a buyer. Guadalajara further claims that it received several inquiries regarding the station. Guadalajara states that it rejected two inadequate offers from potential purchasers. These offers would not have covered the costs already incurred by Guadalajara in acquiring and improving the station, the seller asserts, and a third offer was withdrawn when the potential buyer decided to purchase a different broadcast property.

8. The fifth and final factor deals with the nature of the relevant market in light of our traditional diversity and competition concerns. With regard to television stations, we stated that we would consider the relevant ADI TV market, and, regarding radio, we stated that we would consider the relevant TV metro market. In that connection, Ramar points out that the Albuquerque ADI is served by 18 television stations operated by 14 different owners;[4] these include affiliates of ABC, CBS, NBC, Fox, and Univision, as well as five independent and three noncommercial educational stations. In addition, Ramar states, the Albuquerque metro market is served by 28 radio stations, consisting of 21 "voices." In total, the market is served by more than 30 separate and independent broadcast "voices." The instant transaction will not alter that figure, Ramar argues; because neither Ramar nor its principals now have a "voice" in the market, Guadalajara's "voice" will simply be replaced by that of Ramar. Moreover, Ramar asserts that the Albuquerque ADI is served by 19 daily newspapers, 36 weekly newspapers, and has 55% cable penetration, and 76% VCR penetration.

9. In amending the one-to-a-market rule, the Commission emphasized that the new waiver policy was not an abandonment of its continuing concerns for encouraging diversity of voices and economic competition. *Second Report and Order,* 4 FCC Rcd at 1752. Thus, in evaluating requests for waiver of the one-to-a-market rule, "our goal in all situations is to permit the public to benefit from such efficiencies of operation as may be achieved through the use of common facilities and staff, consistent with the maintenance of diversity and vigorous competition within the market area involved." *Amendment of Section 73.3555* (partial reconsideration), 4 FCC Rcd at 6491. In acting upon requests where the stations are not in the top 25 television markets and fewer than 30 separately owned, operated, and controlled broadcast licensees or "voices" would remain after the acquisition, or where no claim of a "failed station" is availing, the Commission has indicated that applicants must specifically demonstrate the public interest benefits of common ownership of stations ordinarily required by the one-to-a-market rule to be separately owned.

10. We find that the requested waiver meets the public interest case-by-case criteria and will result in significant public service benefits without a substantial adverse impact on the level of diversity and competition in the Albuquerque market. *See, e.g., Tulsa 23,* 5 FCC Rcd 727 (1990); *Holston Valley Broadcasting Corp.,* 5 FCC Rcd 507 (1990). Guadalajara attempted in good faith to assign KIDI(FM) to a buyer which would not require a waiver of our multiple-ownership rules. Further, Ramar has submitted detailed estimates showing that the joint operation of the stations will result in significant cost savings and economic efficiencies, which will not only enhance the likelihood of viability for each station, but also is likely to permit the inauguration of a local newscast, benefitting the public interest. In addition, we note Ramar's assertion that neither it nor its principals have an interest in any full-service broadcast media in the area. Also, as the applicant has demonstrated, the Albuquerque ADI is currently served by more than 30 separate and independent "voices;" the ADI also enjoys substantial cable and VCR penetration and a wide variety of local print media. While the technical facilities of the stations involved are not insubstantial, we note that KBQE(TV) will operate as a UHF station. In conclusion, we believe that Ramar has demonstrated that the Albuquerque area has abundant broadcast and nonbroadcast diversity and competition which will not be significantly affected by grant of the requested waiver.

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[3] Ramar and Ray Moran are the permittees of two translator stations in the Albuquerque ADI. In addition, Ramar and Mary Moran control, respectively, an AM and an unbuilt FM station in Roswell, New Mexico. However, Roswell is not part of the Albuquerque television metropolitan market, the market used for determining the number of radio voices in one-to-a-market cases. *Second Report and Order* at 1751.

[4] Stations KOBF(TV), Farmington, and KOBR(TV), Roswell, both in New Mexico, operate as satellites of commonly owned station KOB-TV, Albuquerque. In addition, station KWNM-TV, Silver City, New Mexico, operates as a satellite of commonly owned station KOAT-TV, Albuquerque.

11. We find that the applicants are fully qualified. In view of the above, we conclude that grant of the requested waiver would serve the public interest, convenience, and necessity.

12. Accordingly, IT IS ORDERED that the application to assign the construction permit of unbuilt station KBQE(TV), Albuquerque, New Mexico, from Mary Moran to Ramar Communications, Inc. IS GRANTED.

13. IT IS FURTHER ORDERED that the application to assign the license of station KIDI(FM), Albuquerque, New Mexico, from Guadalajara Chili Pepper Company to Ramar Communications, Inc., and the request for waiver of the Commission's one-to-a-market rule, Section 73.3555(b), ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLTEL Service Corporation

on behalf of

ALLTEL Ohio, Inc. AAD 91-81

and

The Elyria Telephone Company
Petition for Waiver of Sections
36.125 (f) and 36.154(e)(1) and (2), and
the Definition of "Study Area"
contained in Part 36, Appendix-
Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1992; Released: May 13, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On December 9, 1991, ALLTEL Service Corporation (Alltel), on behalf of its operating affiliates, ALLTEL Ohio, Inc. (Alltel-Ohio) and The Elyria Telephone Company (Elyria), filed a request for waiver of the definition of "study area" and of certain provisions relating to jurisdictional allocation factors contained in Part 36 of the Commission's Rules in order to allow study area and other changes to reflect a merger of the two companies. On December 23, 1991, the Public Utilities Commission of Ohio (Ohio Commission) in Case No. 91-1737-TP-AMT, approved this action.[1] On January 6, 1992, we placed Alltel's petition on public notice. No comments were filed.

Study Area Waiver

2. The definition of study area contained in Part 36, Appendix-Glossary,[2] of the Commission's Rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[3] that the state commission(s) having regulatory authority not oppose the change,[4] and that the public interest be served.

3. Alltel-Ohio is composed of two study areas, Western Ohio, a cost company with 13 exchanges serving approximately 19,000 lines, and Newark, an average schedule company with five exchanges serving 42,000 lines. Elyria is composed of one average schedule study area with 2 exchanges serving 48,000 lines. Alltel-Ohio seeks to combine the three study areas into one cost company study area.

Universal Service Fund (USF) Impact

4. Alltel-Ohio's Western study area currently has a cost per loop of $309.64, and receives USF support of $441,575. The proposed consolidation of the three study areas will produce a study area cost per loop of $229.86. Since the national average cost per loop is $231.09, Alltel-Ohio will not qualify for any USF support. The consolidation would therefore eliminate USF payments of $441,575. *See* Alltel Petition at Attachment A. This clearly responds to our concerns about USF manipulation.

State commission approval

5. As noted above, the Ohio Commission approved this merger in an order adopted on December 23, 1991. This commission action addresses our concerns regarding state approval.

Separations Factor Waiver

6. The petition requests waivers of Sections 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), relating to the computation of the Subscriber Plant Factor (SPF).[5] Alltel requests a waiver to allow Western Ohio's 1981 base-year SPF to be used as the base year SPF for the new study area, and states that the transition of SPF to 25% will be in the last year of the phasein period. Alltel also proposes to use the Western Ohio 1992 SPF allocation factor or .243993 for the jurisdictional allocation of the local loop investment of the modified study area, since both Newark and Elyria are average schedule study areas with no traffic studies to rely on.

7. Alltel also requests waiver of Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period.[6] Alltel seeks to recalculate the Local Switching Equipment - Category 3 composite allocator for the modified study area, and states that the transition to relative DEM will be in the last year of

[1] Submitted by ALLTEL on January 2, 1992, as Supplemental Information.

[2] 47 C.F.R. Part 36, Appendix-Glossary.

[3] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 12, 1984) (*Joint Board Order*).

[4] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (October 10, 1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[5] Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), refers to Section 36.154(d) and relates to the computation of the Subscriber Plant Factor (SPF), which is used to effect the transition (1988 to 1992) to 25 percent allocation to interstate for Category 1.3, CW&F, and subscriber loop plant. This transition period may extend beyond the end of 1992 because annual transition rates are capped at 5 percent per year.

[6] Section 36.125(f), 47 C.F.R. §36.125(f), relates to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period (1988 through 1992). This transition is from a frozen (1987) composite allocator to a dial equipment minutes (DEM) allocator.

the phase-in period. Alltel proposes to use Western Ohio's 1987 frozen component A and the sum of each study area's minutes for component B, in accordance with Part 36.[7]

8. We have reviewed Alltel's SPF and DEM showings (Alltel Petition Attachments B and C), and we find that Alltel has reasonably and acceptably adjusted both SPF and DEM to reflect the merger of Alltel - Ohio and Elyria, while complying with the Commission's rules, and that the proposed revisions to the factors will produce no material effect on separations.

ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Petition of ALLTEL Service Corporation on behalf of Alltel Ohio, Inc. and the Elyria Telephone Company for waiver of Sections 36.125(f) and 36.154(e)(1) and (2), and of the definition of study areas, Part 36 Appendix-Glossary, of the Commission's Rules IS GRANTED to the extent set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

[7] Western Ohio's 1987 frozen component A is .18. The 1991 A component is .055; 1992 is .018; 1993 is .00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications
Tariff F.C.C. Nos. 2, 9, and 11 Transmittal No. 4035

ORDER

Adopted: May 7, 1992; Released: May 7, 1992

By the Chief, Common Carrier Bureau:

1. On April 24, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 8, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces promotional offerings for AT&T 800 Customer Specific Term Plan II.

2. On May 1, 1992 MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate Transmittal No. 4035.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4035 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. Nos. 2, 9, and 11, Transmittal No. 4035, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.* Memorandum Opinion and Order, FCC 92-181, released Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3984
Tariff F.C.C. No. 12

ORDER

Adopted: May 15, 1992; Released: May 15, 1992

By the Chief, Common Carrier Bureau:

1. On April 8, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 16, 1992. This transmittal was originally scheduled to become effective on April 22, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing reduces the basic charge and the minimum annual charge and modifies the volume pricing plan for AT&T's Virtual Telecommunications Network Service Option 55.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3984. AT&T filed a reply to that petition.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3984 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3984, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, FCC 92-181, rel. Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 21, 1992

ICA, CFA Petition for Rulemaking
To Require Service Quality
Standards in LEC Tariffs

International Communications Association (ICA) and Consumer Federation of America (CFA) filed a Joint Petition for Rulemaking (RM-7967, AAD 92-39) on April 6, 1992, in which they request that the Commission amend its Part 61 rules to require that price cap local exchange carriers (LECs) include certain service quality standards in their annual access tariff filings. Arguing that the LECs' internal standards determine the quality of service provided to users, and that users need tariffed standards as a reference point and a basis for action against non-performing LECs, ICA and CFA urge that tariffs include bit error rate and availability, signal-to-noise ratio, call completion, and postdial delay. Petitioners assert that these standards can be tariffed with a minimum of effort or burden on the LEC and the Commission.

The Commission invites interested parties to comment on the proposals advanced by ICA and CFA. Comments may be filed on or before **June 22, 1992**; reply comments may be filed on or before **July 13, 1992**. All pleadings should carry the designation **RM-7967, AAD 92-39**; pursuant to Section 1.51 of the Commission's rules, the original and fourteen copies should be filed with the Secretary's office.

Questions may be directed to Jacqueline Spindler, Accounting and Audits Division, 2000 L St., Suite 812, Washington, DC 20554, telephone 202 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3977
Tariff F.C.C. No. 12

ORDER

Adopted: May 15, 1992; Released: May 15, 1992

By the Chief, Common Carrier Bureau:

1. On April 3, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 16, 1992. This transmittal was originally scheduled to become effective on April 17, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This general regulation filing for Virtual Telecommunications Network Service (VTNS) modifies usage rates for Switched Digital Capability (SDC), introduces virtual on-net calling for SDC, and adds the capability to Global VTNS for calling to Spain and Belgium.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3977. AT&T filed a reply to that petition.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3977 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3977, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, FCC 92-181, rel. Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3976
Tariff F.C.C. No. 12

ORDER

Adopted: May 15, 1992; Released: May 15, 1992

By the Chief, Common Carrier Bureau:

1. On April 3, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 16, 1992. This transmittal was originally scheduled to become effective on April 17, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces a promotion under which AT&T will waive the customer's monthly charge for an optional feature called Alternate Number Translation offered under the carrier's Virtual Telecommunications Network Service.

2. MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3976. AT&T filed a reply to that petition.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 3976 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order.

4. Accordingly, IT IS ORDERED that the petition to reject AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3976, filed by MCI Telecommunications Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, FCC 92-181, rel. Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3826
Tariff F.C.C. No. 12

ORDER

Adopted: May 15, 1992; Released: May 15, 1992

By the Chief, Common Carrier Bureau:

1. On January 29, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 16, 1992. This transmittal was originally scheduled to become effective on February 12, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces a promotion under which AT&T will waive the installation charges for all Virtual Telecommunications Network Service customers that order certain new domestic DTC network components during specified ordering periods.

2. The Competitive Telecommunications Association (CompTel) filed a petition to reject, or, in the alternative, to suspend and investigate Transmittal 3826, and MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3826. AT&T filed a reply to these petitions.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal 3826 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions filed by CompTel and US Sprint do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3826, filed by the Competitive Telecommunications Association and the petition to reject filed by MCI Telecommunications Corporation, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order), reconsidered in part,* Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration,* FCC 92-181, rel. Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southeast Mississippi Telephone Company, Inc.

and

BPM, Inc.

Joint Petition for Waiver of Sections 36.125(f) and 36.154(e)(1) and (2), and the Definition of "Study Area" contained in Part 36, Appendix-Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: May 8, 1992; Released: May 13, 1992

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On August 30, 1991, Southeast Mississippi Telephone Company, Inc. (SE Mississippi), a wholly-owned subsidiary of TDS Telecom, and BPM, Inc. (BPM), a wholly-owned subsidiary of Colonial Telephone Company, filed a joint peititon for waiver of the definition of "study area" and of certain provisions relating to jurisdictional allocation factors contained in Part 36 of the Commission's Rules. SE Mississippi has purchased four of BPM's five exchanges in Mississippi. On September 10, 1991, at the request of Commission staff, the parties filed a letter providing further information. The National Exchange Carrier Association (NECA) and the United States Telephone Association (USTA) filed comments. The parties also submitted the Mississippi Public Service Commission order of March 13, 1991, approving this transaction. The requested waiver, which we grant, will allow BPM to remove these exchanges from its Mississippi study area, and SE Mississippi to establish a new study area for these exchanges.

Study Area Waiver

2. The definition of study area contained in Part 36, Appendix-Glossary,[1] of the Commission's Rules states that study area boundaries shall be frozen as they were on November 15, 1984. Companies wishing to change their study area boundaries can request a waiver of that rule. The Commission's three primary concerns in study area boundary change petitions are that the change have no adverse impact on the Universal Service Fund (USF) support program,[2] that the state commission(s) having regulatory authority not oppose the change,[3] and that the public interest be served.

Universal Service Fund (USF) Impact

3. The parties request that the pre-transaction level of high cost support, $43,413 per month, be maintained, and shared pro rata, for the first year after the transaction. Thus, BPM would receive $11,028 per month, and SE Mississippi would receive $32,385.[4] Although the recipients would change, there woud be no impact on the amount of high cost support being paid. Both companies would then provide actual operating expenses for NECA's recalculation of USF compensation in the future. Neither party expects any unusual changes in operational factors.[5] Thus, we believe that this transaction is not conceived in order to increase USF support, and that it will not result in an adverse impact on the USF.

State commission approval

4. The joint petition includes as an attachment the March 13, 1991, Mississippi PSC decision approving the transaction considered here. The MPSC approved the transfer of assets and of the Certificate of Public Convenience and Necessity for the provision of telecommunications services. This commission action addresses our concerns regarding state approval.

SPF and DEM waiver

5. The parties request waiver of Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), relating to the computation of the Subscriber Plant Factor (SPF).[6] The 1991 SPF for the pre-transaction company was .26852; the proposed SPF is .30972 for SE Mississippi and .23181 for BPM. The parties explain, in a letter submitted Sept. 10, 1991, that the proposed SPFs are based upon historical company records for the firve exchanges and the Commission's SPF transition rules.

6. The parties also request waiver of Section 36.125(f), 47 C.F.R. §36.125(f), relating to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) in-

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[1] 47 C.F.R. Part 36, Appendix-Glossary.

[2] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 at para. 65 (December 12, 1984) (*Joint Board Order*).

[3] *See generally* Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, 5 FCC Rcd 5974 (October 10, 1990). The Commission therein describes the factors that led to the present restriction on study area changes and the reasons why it is proposing to change that restriction.

[4] NECA's filing for 1992 payments reveals that the companies have filed on a combined basis. This order's approval of the study area waiver will establish the two as separate entities, and their USF filing with NECA should reflect that.

[5] The joint petition states that, while USF support cannot be predicted accurately, neither Southeast nor BPM expect USF compensation to change in the future, except for changes caused by normal operational factors.

[6] Section 36.154(e)(1) and (2), 47 C.F.R. §36.154(e)(1) and (2), refers to Section 36.154(d) and relates to the computation of the Subscriber Plant Factor (SPF), which is used to effect the transition (1988 to 1992) to 25 percent allocation to interstate for Category 1.3, CW&F, and subscriber loop plant. This transition period may extend beyond the end of 1992 because annual transition rates are capped at 5 percent per year.

vestment for the transitional period.[7] The company's pre-transaction category 3 factor was .40415; the proposed factor is .47206 for SE Mississippi and .21864 for BPM. In their September 10 letter, the parties state that COE Category 3 disaggregated factors were available at the exchange level, and that the 1991 Category 3 factors set forth in the Petition are based on DEM and the 1987 composite interstate allocation for categories 4, 5, 6 and 7, adjusted for recognition of the Part 36 transition rules. The September letter also states that the Category 3 factors have been computed based on the Commission's Part 36 rules.

7. We have reviewed the parties' proposals regarding separations factors, and the supporting data, and we find that BPM and SE Mississippi have reasonably and acceptably adjusted both SPF and DEM to reflect the described transaction while complying with the Commission's rules, and that the proposed revisions to the factors will produce no material effect on separations.

ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), and Sections 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§0.91, 0.291, that the Joint Petition of Southeast Mississippi Telephone Company, Inc., and BPM, Inc. for waiver of Sections 36.125(f) and 36.154(e)(1) and (2), and of the definition of study areas, Part 36 Appendix-Glossary, of the Commission's Rules IS GRANTED to the extent set forth above.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief, Operations
Common Carrier Bureau

[7] Section 36.125(f), 47 C.F.R. §36.125(f), relates to the computation of the composite interstate factor used in the separation of Local Switching Equipment - Category 3 (COE Category 3) investment for the transitional period (1988 through 1992). This transition is from a frozen (1987) composite allocator to a dial equipment minutes (DEM) allocator.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 3857
Tariff F.C.C. No. 12

ORDER

Adopted: May 15, 1992; Released: May 15, 1992

By the Chief, Common Carrier Bureau:

1. On February 10, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective May 16, 1992. This transmittal was originally scheduled to become effective on February 24, 1992, on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing revises Virtual Telecommunications Network Service (VTNS) Option 50. Specifically, the filing reduces the basic charge for Option 50; modifies the service elements included in the basic charge and clarifies how service element minimums are calculated; modifies a provision governing application of the minimum annual charge and clarifies the volume pricing plan in this option.

2. The Competitive Telecommunications Association (CompTel) and US Sprint Communications Company Limited Partnership (US Sprint) filed petitions to reject, or, in the alternative, to suspend and investigate Transmittal 3857, and MCI Telecommunications Corporation (MCI) filed a petition to reject Transmittal 3857. AT&T filed a reply to these petitions.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal 3857 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petitions filed by CompTel and US Sprint do not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, to suspend and investigate AT&T Communications Tariff F.C.C. No. 12, Transmittal No. 3857, filed by the Competitive Telecommunications Association and US Sprint Communications Company Limited Partnership and the petition to reject filed by MCI Telecommunications Corporation, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (*IXC Order*), *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further reconsideration*, FCC 92-181, rel. Apr. 17, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-259

In the Matter of

Amendment of Section 73.202(b),	RM-7309
Table of Allotments,	RM-7942
FM Broadcast Stations.	RM-7943
(Canovanas, Culebra,	RM-7944
Las Piedras, Mayaguez,	RM-7948
Quebradillas, San Juan,	
Santa Isabel and Vieques,	
Puerto Rico, and	
Christiansted and Fredericksted,	
Virgin Islands)[1]	

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: May 15, 1992; Released: May 29, 1992

Comment Date: July 20, 1992
Reply Comment Date: August 4, 1992

By the Acting Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making and Orders to Show Cause*, 6 FCC Rcd 5310 (1991), requesting comments on the petition for rule making jointly filed by Carlos J. Colon-Ventura ("Colon-Ventura"), licensee of Station WSAN, Vieques, Puerto Rico, and Jose J. Arzuaga ("Arzuaga"), licensee of Station WREI, Quebradillas, Puerto Rico ("petitioners"). Colon-Ventura sought the substitution of Channel 252A for Channel 255B at Vieques, the reallotment of Channel 252A from Vieques to Canovanas, Puerto Rico, and the modification of Station WSAN's license accordingly. Arzuaga requested the substitution of Channel 258A for Channel 252A at Quebradillas, Puerto Rico, and the modification of Station WREI's license to specify the alternate Class A frequency. In order to accommodate the Canovanas and Quebradillas allotments, petitioners further requested the substitution of Channel 254B for Channel 256B at Mayaguez, Puerto Rico, licensed to Station WKJB-FM, and the substitution of Channel 256B for Channel 253B at San Juan, Puerto Rico, licensed to Station WPRM-FM. Comments were filed by Arzuaga, WKJB-AM-FM, Inc. ("WKJB"), licensee of Station WKJB-FM, Mayaguez, Puerto Rico, and Arso Radio Corporation ("Arso"), licensee of Station WPRM-FM, San Juan,[2] Colon-Ventura, Amor Family Broadcasting Group ("Amor"), V.I. Stereo Communications Corp. ("V.I. Stereo"), licensee of Station WVIS, Christiansted, Virgin Islands, and Luis Hernandez ("Hernandez").[3] Reply comments were filed by WKJB, Colon-Ventura and Arso.

2. Prior to the issuance of the *Notice*, Amor filed an opposition to the joint petition of Arzuaga and Colon-Ventura because it conflicted with its proposal to allot Channel 258B to Santa Isabel, Puerto Rico. Amor's Santa Isabel proposal had been denied by the Commission but an appeal was pending before the U.S. Court of Appeals. Pursuant to the court's affirmation of the Commission's denial,[4] Amor filed a withdrawal of its opposition. However, the staff inadvertently failed to note that the withdrawal pleading requested instead the allotment of Channel 251A to Santa Isabel. Because the proposed allotment at Santa Isabel is interrelated with the Vieques and Quebradillas proposals, it should have been considered in conjunction with petitioners' proposals in the *Notice*. Accordingly, we now issue this *Further Notice* to provide an opportunity for parties to file comments and/or counterproposals to Amor's proposal. This *Further Notice* also discusses the comments and interrelated proposals filed in response to the *Notice* and affords an opportunity for comments on Colon-Ventura's counterproposal as well as comments and/or counterproposals in response to the Santa Isabel, Vieques/Culebra and Fredericksted proposals.

3. Amor seeks the allotment of Channel 251A to Santa Isabel, a community of 6,948 persons,[5] as its first local aural transmission service, and states its intention to apply for the channel, if allotted.[6] It states that the channel can be allotted in compliance with the Commission's minimum distance separation requirements, without a site restriction, if the Mayaguez and San Juan substitutions proposed in the *Notice* are adopted. Recognizing this, Amor states its intention to share with Arzuaga and Colon-Ventura reimbursement costs to Stations WKJB-FM and WPRM-FM. Channel 251A can be allotted to Santa Isabel in compliance with the Commission's minimum distance separation requirements, if Channel 253B is deleted from

[1] The communities of Culebra, Las Piedras and Santa Isabel, Puerto Rico, and Christiansted and Fredericksted, Virgin Islands, have been added to the caption.

[2] The comments of both Arso and WKJB largely address the merits of Colon-Ventura's proposal to downgrade Station WSAN from a Class B to a Class A and reallot the station from Vieques to Canovanas. Colon-Ventura has now withdrawn that proposal and instead proposes the reallotment of Station WSAN to Las Piedras. Therefore, that portion of the comments filed by Arso and WKJB-FM which address the merits of the Canovanas proposal are moot and will not be addressed.

[3] The pleadings filed by V.I. Stereo, Amor and Hernandez were styled as counterproposals. However, they are not mutually exclusive with the proposals set forth in the *Notice*. Therefore, they are not acceptable as counterproposals. *See Implementation of BC Docket 80-90 to Increase the Availability of FM Broadcast Assignments*, 5 FCC Rcd 931 (1990). However, because we are issuing this *Further Notice* in order to consider Amor's Santa Isabel proposal, we believe it appropriate to also consider the interrelated proposals of V.I. Stereo and Hernandez.

[4] *See Amor Family Broadcasting v. FCC*, 918 F.2d 960 (D.C. Cir. 1990).

[5] Population figures are taken from the 1980 U.S. Census, unless otherwise indicated. The 1990 U.S. Census credits Santa Isabel with a population of 6,623 persons.

[6] Amor failed to comply with Section 1.52 of the Commission's Rules by including in its petition a statement verifying the accuracy of the information contained therein. Therefore, it is requested to do so in comments. Failure to comply with this requirement could result in the dismissal of its petition.

San Juan, with a site restriction of 3.6 kilometers (2.3 miles) east to avoid a short-spacing to proposed Channel 254B at Mayaguez.[7]

4. V.I. Stereo, licensee of Station WVIS, Channel 291B, Christiansted, St. Croix, Virgin Islands, requests the reallotment of its channel to Vieques, Puerto Rico. V.I. Stereo states that Channel 291B can be allotted to Vieques in compliance with the Commission's Rules if Channel 254A instead of Channel 293A is allotted to Culebra.[8] It also states that it will apply for Channel 291B, if reallotted to Vieques. V.I. Stereo submits that Vieques is an island located off the east coast of Puerto Rico, with a population of approximately 7,500 persons. Vieques currently receives local aural transmission service from FM Station WSAN and AM Station WIVV. However, if the instant *Notice* is adopted, Station WSAN will be relicensed to Canovanas and thus Station WVIS will provide Vieques with its first local FM transmission service. Further, if its proposal is adopted, V.I. Stereo points out that Christiansted, with a population of only 2,800 persons, will still receive local aural transmission service from four FM stations.[9] Thus, V.I. Stereo contends that reallotting Channel 291B from Christiansted to Vieques would result in a more efficient use of the spectrum, particularly in light of Christiansted's continuing economic problems resulting from Hurricane Hugo.[10]

5. Channel 291B can be allotted to Vieques in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. Channel 254A can be allotted to Culebra without the imposition of a site restriction if Channel 253B is deleted from San Juan.[11] The allotment of Channel 291B at Vieques and Christiansted are mutually exclusive since the Commission's Rules require a minimum distance separation of 241 kilometers for co-channel Class B allotments but the two communities are only 81 kilometers apart. Finally, V.I. Stereo states its intention to share the reimbursement costs incurred by the affected San Juan and Mayaguez licensees.

6. Hernandez requests the allotment of Channel 253A to Fredericksted, Virgin Islands, as the community's first local aural broadcast service, and states his intention to apply for the channel, if allotted. Channel 253A can be allotted to Fredericksted, without the imposition of a site restriction, if Channel 253B is deleted from San Juan.[12] Parties requesting channel allotments which require an existing licensee or permittee to change channel are required to reimburse the affected parties for the reasonable costs associated with the channel change. However, Hernandez failed to state his intention to reimburse the licensees of Station WPRM-FM at San Juan and Station WKJB-FM at Mayaguez, for the costs associated with their channel changes which are necessary to effectuate this proposal. Therefore, he is requested to do so in comments to this *Further Notice*.[13] Failure to state an intention to reimburse these parties will result in the denial of Hernandez' request.

7. At the request of Colon-Ventura, the Commission proposed the substitution of Channel 252A for Channel 255B at Vieques, the reallotment of Channel 252A to Canovanas, and the modification of Station WSAN's license accordingly. However, the *Notice* questioned whether Colon-Ventura's proposed allotment to Canovanas should be credited with providing the community its first local FM transmission service or whether Canovanas should be credited with all of the aural services licensed to communities within the San Juan Urbanized Area. Colon-Ventura did not respond to the questions concerning the first local service preference but instead states that upon further review, it believes that there may be terrain obstructions which would prevent line-of-sight coverage to Canovanas.[14]

8. Colon-Ventura, in his counterproposal, requests the allotment of Channel 252A to Las Piedras, Puerto Rico, as its first local aural transmission service, and the modification of Station WSAN's license accordingly. Channel 252A can be allotted to Las Piedras with a site restriction of 14.6 kilometers (19.1 miles) northeast to avoid short-spacings to Station WBRQ, Channel 249A, Cidra, Puerto Rico, and to proposed Channel 251A at Santa Isabel.[15] The allotment of Channel 252A to Las Piedras and Channel 255B at Vieques are mutually exclusive since the Commission's Rules stipulate a minimum distance separation of 69 kilometers for third adjacent Class A and Class B allotments but the two communities are separated by only 49 kilometers. Colon-Ventura states that Las Piedras, with a 1990 U.S. Census municipio population of 27,896 persons,[16] is not located in any Urbanized Area. Colon-Ventura describes Las Piedras as an independent community, with its own local government which provides the residents with municipal services. Additionally, he states that Las Piedras has its own businesses, health facilities, transportation systems, telephone book section and zip code. Colon-Ventura also contends that allotting Channel 252A to Las Piedras will enable Station WSAN to provide

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[7] The coordinates for Channel 251A at Santa Isabel are North Latitude 17-58-12 and West Longitude 66-22-09.

[8] Applications for Channel 293A at Culebra have been filed by Aurio A. Matos and Lloyd Santiago-Sartos and Lourdes. A copy of this *Further Notice of Proposed Rule Making* will be sent to these two applicants.

[9] Christiansted actually receives local aural transmission service from six stations, including fulltime AM Station WSTX, noncommercial educational FM Station WIVH and commercial FM Stations WAVI, WJKC, WVIQ, WSTX-FM, and WVIS.

[10] V.I. Stereo notes that Channel 293A could be allotted to Christiansted, thereby enabling the community to retain its current number of allotments. However, V.I. Stereo did not state its intention to apply for the channel, if allotted. Therefore, we will not consider this aspect of its proposal.

[11] The coordinates for Channel 291B at Vieques are North Latitude 18-19-39 and West Longitude 65-18-05. The coordinates for Channel 254A at Culebra are 18-18-18 and 65-18-06.

[12] The coordinates for Channel 253A at Fredericksted are North Latitude 17-42-48 and West Longitude 64-53-00.

[13] Hernandez also failed to comply with Section 1.52 of the Commission's Rules by including in its petition a statement verifying the accuracy of the information contained therein. Therefore, he is requested to do so in comments. Failure to comply with this requirement could result in the dismissal of his petition.

[14] In reply comments, Colon-Ventura states that line-of sight coverage could be provided to Canovanas. However, he no longer supports the allotment, instead favoring Las Piedras.

[15] The coordinates for Channel 252A at Las Piedras are North Latitude 18-16-14 and West Longitude 65-45-33.

[16] A municipio is equivalent to a county on the mainland. It is a governmental unit and has legally established boundaries. Usually, each municipio has a ciudad or pueblo where the seat of government is located.

service to 807,166 people in an area of 1,983 square kilometers in lieu of its present service to 182,054 people in an area of 1,023 square kilometers, which represents a gain of 625,112 people or 34. Should his proposal be adopted, Colon-Ventura claims that the population gain will come at the expense of only 1,832 people who will no longer be able to receive Station WSAN. However, he states that this loss area will be able to receive service from the new Culebra allotment, as well as from Station WVIS should the Commission grant V.I. Stereo's petition.

9. Colon-Ventura, in further support of his proposal, states that although he is seeking a lower class channel than presently licensed to Station WSAN, the population and land area gains described above are possible because much of the station's present signal is lost over water. Further, he states that the municipio population of Vieques is 7,662 persons, considerably less than that of Las Piedras. Finally, he notes that adoption of his proposal would result in the modification of the license of Quebradillas' Station WREI to specify Channel 258A in lieu of its present Channel 252A, thus enabling the station to operate with the maximum Class A power of 6 kW instead of its present 3 kW, as well as permitting the allotment of a first local aural service to Santa Isabel, as requested by Amor.

10. Arzuaga, in his comments, reiterates his support for the substitution of channels at Quebradillas and his willingness to have Station WREI's license modified to specify operation on Channel 258A. He also reaffirms his willingness to share the reimbursement costs incurred by Stations WKJB-FM and WPRM-FM.

11. Arso, licensee of Station WPRM-FM, San Juan, and WKJB, licensee of Station WKJB-FM, Mayaguez, both object to the modification of their licenses. Arso argues that Colon-Ventura's counterproposal cannot be accepted because it violates the Administrative Procedures Act ("APA") and the Commission's rules regarding the scope of rule makings. It states that both the APA and Commission rules require that the content of notices of proposed rule making include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[17] In this case, Arso contends that Colon-Ventura's Las Piedras request does not fall within that definition and is thus too late for consideration. It also submits that because the parties to this proceeding were not informed by Colon-Ventura of his abandonment of the Canovanas proposal before the initial comment deadline, the opponents were forced to needlessly expend resources analyzing and responding to a moot proposal. Arso argues that, for this reason alone, Colon-Ventura's counterproposal should be dismissed.

12. Arso also discusses the merits of the counterproposal filed by Colon-Ventura, and the interrelated proposals of Amor and V.I. Stereo. Arso argues that Colon-Ventura's request to downgrade Station WSAN from a Class B to a Class A channel and relocate the station to Las Piedras should be denied because it requires the substitution of channels by three existing stations,[18] the result would be inconsistent with the larger and more effective use of radio, and also would be contrary to the fair, efficient, and equitable distribution of radio service. Arso believes that nothing is gained by the substitution of Station WREI's present Class A channel for another Class A channel and thus that the disruption of service by Stations WPRM-FM and WKJB-FM solely in order to permit Station WSAN to downgrade its operation does not serve the public interest. As to the community of Las Piedras itself, Arso states that the relevant population is not the municipio, as cited by Colon-Ventura, but the barrio.[19] Using the correct population figures which Arso states are 2,087 for the Las Piedras pueblo and 1,702 for the Isabel II (Vieques) pueblo, it argues that a gain of only 385 people in the station's community of license does not warrant the disruption which would be caused to both WPRM-FM and WKJB-FM. Further, Arso alleges that Colon-Ventura is still attempting to manipulate the FM allotment criteria. Although no longer specifying a community within the San Juan Urbanized Area, such as Canovanas, he is specifying a community which is adjacent to the San Juan and Caguas Standard Metropolitan Statistical Areas.

13. Arso also opposes Amor's request for the allotment of Channel 251A to Santa Isabel. It contends that Amor is trying to "piggy-back" on the petitioners' Vieques-Canovanas proposal even though it failed to file a statement of continuing interest in an earlier proceeding where an allotment to Santa Isabel was under consideration.[20] Because the Santa Isabel allotment requires the same channel changes as proposed in the *Notice*, Arso argues that the proposal should be denied because it requires more than two existing stations to change channel. Arso opposes V.I. Stereo's counterproposal for the same reason, noting that Channel 291B at Vieques requires channel changes for stations licensed to San Juan, Culebra, Mayaguez and Quebradillas. However, should the Commission nevertheless grant the petition, Arso requests that both petitioners as well as Amor and V.I. Stereo be made jointly and severally liable for the required reimbursement. Arso provides a description of the costs it envisions as incurring if ordered to change channel.

14. WKJB also objects to Colon-Ventura's counterproposal. It contends that changing the community to which Station WSAN would be licensed to changes the fundamental nature of the petition for rule making and thus the reason for modifying the licenses of Stations WKJB-FM and WPRM-FM. WKJB argues that allowing Colon-Ventura to change the heart of its proposal "at this late date" and require the opponents to respond to the new proposal in the 15 day period routinely allowed for reply comments violates the due process requirement of Section

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[17] Arso cites to 5 U.S.C.A. Section 553(b)(3) (1989); 47 C.F.R. Section 1.413(c) (1990).

[18] Arso considers the channel change by Station WREI at Quebradillas to be the third existing station required to change channel. *See Columbus, Nebraska, et al.*, 51 FR 4926 (February 10, 1986), in which the Commission set forth in policy concerning allotments which require more than two existing stations to change channel.

[19] Arso incorrectly states that the relevant community of license is the barrio. Rather, it is the pueblo, which is defined by the U.S. Census Bureau as "the barrio or group of barrios which identifies the municipio center of government." Indeed, Arso cites *Aguada, Puerto Rico, et al.*, where the Commission restated the policy that in Puerto Rico the relevant boundaries for determining principal city coverage, and thus the community of license, is the "pueblo" (town) and not the "municipio" (equivalent to a mainland county). *See* 51 R.R. 2d 1329 (1982), and cases cited therein. However, the population figures cited by Arso are those of the respective pueblo.

[20] *See Santa Isabel, Puerto Rico*, 4 FCC Rcd 3412 (1989).

316 of the Communications Act of 1934, as amended, which requires a 30 day period for such responses, citing *License Modification Pursuant to Section 316*, 2 FCC Rcd 3327 (1987). However, WKJB also responds to the Las Piedras proposal. WKJB does not question the gain and loss population figures given by Colon-Ventura. However, it does take issue with Colon-Ventura's characterization of this loss as insignificant. Colon-Ventura states that the relocation of Station WSAN to Las Piedras will result in a loss of service to 1,832 people over a 109 square kilometer area (1.01 percent of WSAN's current service area), but that this service will be restored once the new Culebra station is on the air or if Station WVIS is relocated from Christiansted to Vieques. WKJB argues that the loss of service by WSAN to 547 of the 1,832 people over a 109 square kilometer area, while it may represent only a small percentage of WSAN's current service area, actually represents approximately 20 percent of the total local population of Vieques. WKJB avers that this loss is significant because Vieques is not located on the Puerto Rican mainland and thus access between the mainland and Vieques is necessarily restricted. Therefore, it argues that access to a local station increases in importance. Further, Colon-Ventura's reliance on the Culebra allotment to justify modification of Station WKJB-FM is misplaced because Culebra has already been allotted a channel in a separate proceeding which does not require the dislocations proposed here. Finally, WKJB states that its station has been broadcasting on its original and current channel since January of 1963. It argues that uninterrupted service since that time on the same channel has promoted public and advertiser reliance on the station and allowed Station WKJB and the public to identify the station by its channel number. It believes that changing channels would only undermine this foundation and result in listener and advertiser confusion, requiring Station WKJB to begin again to develop listener identity with Station WKJB's spot on the dial, thus greatly harming the station's revenues.

15. As to the proposals filed by Amor and V.I. Stereo, WKJB states that if their proposals are dependent upon Station WSAN migrating to Canovanas, they cannot be adopted since the petitioner has abandoned the Canovanas proposal in favor of Las Piedras. However, it intends to respond more fully if the Commission's gives Public Notice of these proposals.

16. In reply comments, Colon-Ventura restates his support for the allotment of Channel 252A to Las Piedras. He contends that adoption of his proposal will serve the public interest, reiterating the gain in population served with only 1,832 persons losing service, a loss which will be negated once the new allotment at Culebra is on the air or from Station WVIS if relicensed to Vieques. Further, the reallotment of Station WSAN to Las Piedras will enable Station WREI at Quebradillas to increase its facilities to 6 kW, the maximum allowed for Class A stations, thus expanding the station's service area and population coverage. Colon-Ventura also supports the Santa Isabel and Fredericksted proposals since they can be adopted consistent with the Las Piedras proposal.

DISCUSSION

17. As an initial matter, we tentatively conclude that a new *Order to Show Cause*, with its attendant thirty-day response period, need not be issued to either Arso or WKJB. *See Eddyville and Fort Madison, Iowa, and Louisiana, Missouri*, 4 FCC Rcd 7774 (1989). As part of the *Notice of Proposed Rule Making* herein, an *Order to Show Cause* was issued to both parties. Even though Colon-Ventura has filed a counterproposal changing its proposed community of license, the effect on Arso and WKJB-FM are unchanged. Regardless of whether Channel 252A is allotted to Canovanas or some other community, these stations would be required to change channel and any disruptive effect on their operations would be the same. Arso and WKJB-FM may, of course, file comments in response to this *Further Notice*.[21]

18. We also disagree with Arso that Colon-Ventura's counterproposal violates the APA and the Commission's Rules by exceeding the scope of the *Notice* or that it was untimely filed. There is no prohibition against a petitioner submitting, as a counterproposal, a new proposal which is mutually exclusive with that originally submitted and proposed in a *Notice of Proposed Rule Making*. *See, e.g., Lady's Island and Ridgeland, South Carolina*, 6 FCC Rcd 7253 (1991) and *Fairmont, North Carolina, et al.*, 6 FCC Rcd 4285 (1991). The APA generally prohibits the Commission from adopting rules which have not been given sufficient public notice and an opportunity to respond. Here, the *Notice* accurately set forth the rule changes proposed by the petitioners and specified comment and reply comment periods. In response to the *Notice*, Colon-Ventura filed a counterproposal before the close of the initial comment period, as specified by Section 1.420(d) of the Commission's Rules and paragraph 3 of the *Appendix* attached to the *Notice*. Arso is correct that Colon-Ventura's counterproposal could not be granted without giving public notice of its filing and an opportunity for the filing of responses. However, the Commission's general practice is to issue a Public Notice announcing the filing of counterproposals and setting forth a period for responses. In this proceeding, we are deviating from the normal practice of issuing a Public Notice and instead issuing a *Further Notice of Proposed Rule Making* which sets forth the substance of the proposed rule change and affords an opportunity for response. While it is unfortunate that the opponents expended resources in responding to a proposal which was ultimately withdrawn, that alone does not constitute a valid reason for dismissing Colon-Ventura's Las Piedras proposal. Likewise, Colon-Ventura's petition and counterproposal, as well as V.I. Stereo's proposal, do not violate the Commission's policy against rule makings which propose allotments which require three or more authorized stations to change channel. Arzuaga, as a co-petitioner, has requested the change of channel at Quebradillas and thus the modification of Station WREI's license does not constitute a required change by a third authorized facility. V.I. Stereo's proposal, which requires a change at San Juan, Mayaguez and Culebra also comply's with the Commission's policy because there is no authorized station on the Culebra channel. *See Columbus, Nebraska, supra.*

[21] As a practical matter, both Arso and WKJB have had in excess of thirty days in which to prepare their responses since Colon-Ventura's counterproposal was served on them at the same time the requests were filed with the Commission.

19. Both Arso and WKJB did file responses to Colon-Ventura's Las Piedras proposal. We do not wish to foreclose either party from presenting further information and/or arguments in response to this *Further Notice*. However, we tentatively conclude that neither party has raised a substantial and material question of fact which would warrant a hearing on the modification of the licenses of Stations WKJB-FM and WPRM-FM as set forth in the *Notice of Proposed Rule Making* and this *Further Notice of Proposed Rule Making*. Both Arso and WKJB are generally concerned about the disruption of existing service to listeners who have grown accustomed to the stations' placement on the dial and thus the economic harm which would be caused the stations as the listeners and advertisers are reeducated. However, as the Commission has held on numerous occasions, the substitution of an existing station's channel at one community serves the public interest where the substitution permits the provision of a new or expanded service at another community. *See, e.g., Broken Arrow, Oklahoma, et al.*, 3 FCC Rcd 6508 (1988) and cases cited therein. In this case, even if we were not to grant Colon-Ventura's counterproposal, the change in Stations WKJB-FM and WPRM-FM's operating channels could enable a first local service at Santa Isabel, for which an expression of interest and commitment to reimburse have been received.

20. We believe the public interest would be served by seeking comments on the proposals discussed above. The substitution of Channel 252A for 255B at Vieques and the reallotment of Channel 252A from Vieques to Las Piedras could provide Las Piedras with its first local aural transmission service without depriving Vieques of its sole local aural transmission service. Las Piedras is a community for allotment purposes and is not located within any Urbanized Area. Las Piedras' location within a Standard Metropolitan Statistical Area does not foreclose consideration of the proposal. Further, the allotment of Channel 251A to Santa Isabel and Channel 253A to Fredericksted could provide each community with its first local aural broadcast service. Additionally, the substitution of Channel 258A for Channel 252A at Quebradillas could enable Station WREI-FM to operate on a full power Class A channel and thus expand its coverage area. Finally, the reallotment of Channel 291B from Christiansted, Virgin Islands, to Vieques, Puerto Rico, could provide the community with its first local FM transmission service, if Station WSAN is relicensed to Las Piedras, without depriving Christiansted of its sole local aural broadcast service. As requested, we also propose to modify Colon-Ventura's license for Station WSAN to specify Las Piedras in lieu of Vieques as its community of license and to modify V.I. Stereo's license for Station WVIS to specify Vieques instead of Christiansted as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, competing expressions of interest in either of these channels will not be accepted since the channel allotments are mutually exclusive.

21. The proposed allotments at Santa Isabel and Mayaguez are located in the vicinity of the Commission's Santa Isabel monitoring station. Therefore, the affected parties will be required to comply with the provisions of Section 73.1030(c) of the Commission's Rules, if the allotment request is granted.

22. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Culebra, Puerto Rico	293A	254A
Las Piedras, Puerto Rico	--	252A
Mayaguez, Puerto Rico	231B, 248B, 256B	231B, 248B, 254B[22]
Quebradillas, Puerto Rico	252A	258A
San Juan, Puerto Rico	229B, 253B, 260B, 273B, 284B, 289B	229B, 256B, 260B, 273B, 284B, 289B
Santa Isabel, Puerto Rico	--	251A
Vieques, Puerto Rico	255B	291B
Christiansted, Virgin Islands	228B, 236B, 258B, 262B, 291B	228B, 236B, 258B, 262B
Fredericksted, Virgin Islands	--	253A

23. Parties may comment on any of the proposals set forth herein. However, we will not accept counterproposals to the proposed allotments at Mayaguez, Quebradillas or San Juan since an opportunity for the filing of such counterproposals has already been afforded. We also will not accept counterproposals with regard to the allotment of Channel 252A at Las Piedras since it is a counterproposal to the proposal in the *Notice* to allot Channel 252A to Canovanas. However, counterproposals may be filed with regard to the proposed allotments at Culebra, Santa Isabel and Vieques, Puerto Rico, and Fredericksted, Virgin Islands.

24. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

25. Interested parties may file comments on or before **July 20, 1992,** and reply comments on or before **August 4, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

[22] Although V.I. Stereo states that the substitution of Channel 253B instead of Channel 254B at Mayaguez would be "desirable," no technical reason exists for the change and no explanation of why it would be "desirable" was provided. Therefore, we will continue to only propose the substitution of Channel 254B for Channel 256B at Mayaguez.

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Castleton, Virginia 22716
(Counsel to Arzuaga)

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue,
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Santa Isabel,
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(Petitioner for Santa Isabel)

Luis Hernandez
P.O. Box 980
Quebradillas,
Puerto Rico 00678
(Petitioner for Fredericksted)

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John P. Bankson, Jr., Esq.
Hopkins & Sutter
888 - 16th Street, N.W.
Washington, D.C. 20006
(Counsel to Arso)

26. IT IS ORDERED, That the Secretary of the Commission SHALL SEND, by Certified Mail, Return Receipt Requested, a copy of this *Further Notice of Proposed Rule Making* to the applicants for Channel 293A at Culebra, Puerto Rico, as follows:

Aurio A. Matos
P.O. Box 847
Mayaguez,
Puerto Rico 00681
(ARN-911114MS)

Lloyd Santiago-
Santos & Lourdes
Marina Bahia Plaza 9RB35
Catano, Puerto Rico 00632
(ARN-911115MP)

27. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

28. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed.

Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

FaxChek Systems' Request for Waiver of Section 64.711 of the Commission's Rules — File No. ENF-92-02

ORDER

Adopted: May 19, 1992; Released: May 29, 1992

By the Chief, Common Carrier Bureau:

1. On November 29, 1991, FaxChek Systems (FaxChek), a California sole proprietorship, filed a request for a waiver of the preamble requirement in Section 64.711 of the Commission's rules, 47 C.F.R. § 64.711, as it applies to FaxChek's automated, non-verbal, facsimile testing service.[1] That rule was adopted in *Policies and Rules Concerning Interstate 900 Telecommunications Services (Report and Order)*[2] and became effective on December 2, 1991. The Chief, Enforcement Division, granted an interim waiver of the requirement pending final action on FaxChek's request.[3]

2. FaxChek provides an interstate service in which users test their facsimile machines by sending a test facsimile transmission to a 900 telephone number. During the call, FaxChek's specialized equipment makes measurements of phone line conditions, facsimile image transmission and the protocol exchanges. FaxChek states that, within five minutes, it sends back a test report by facsimile. FaxChek states that its service reduces maintenance costs and increases the reliability of facsimile machines.

3. Section 64.711 of the Commission's rules requires that most pay-per-call programs begin with a preamble that states the cost of the call, gives the name of the information provider, and describes the product or service that the caller will receive. The preamble must also give the caller a reasonable opportunity to hang up after the preamble message is delivered but before charges are imposed.

4. In support of its waiver request, FaxChek states that its service is limited to facsimile machines using the Group III standards promulgated by the International Telegraph and Telephone Consultative Committee (CCITT), which cover nearly all facsimile machines in the United States. FaxChek explains that it explored three alternative methods of providing a preamble through the customer's facsimile machine, but found all of them to be unworkable. First, it attempted to transmit a verbal preamble through the speaker in the facsimile machine, but found that that method was not workable because facsimile speaker components are designed to transmit tones, not voice messages. As a result, voice message transmissions using the facsimile speaker are unintelligible. Also, it states that verbal preambles are not feasible because Group III standards require that the answer tone must begin within 2.5 seconds after the phone connection is established. FaxChek states that this short interval does not allow enough time for a verbal preamble to be transmitted.

5. FaxChek states the second method it considered involved delivering a non-verbal preamble on the facsimile machine's liquid crystal display. FaxChek states that this method is unsuitable because the Group III standards limit liquid crystal display messages to twenty numeric characters. Moreover, FaxChek states, many users of facsimile machines do not pay attention to the liquid crystal display messages when sending facsimile messages.

6. The third option explored by FaxChek involved an attempt to interrupt the facsimile message that the caller was trying to send and, instead, send an outbound facsimile containing the preamble information. FaxChek states that this method proved inadequate because the Group III standards would not permit it to send a facsimile containing a preamble and to receive the caller's facsimile in the same call. FaxChek adds that, even if the caller used the "polling" mode to request a facsimile containing the preamble information from FaxChek, it is not technically possible to allow the caller to transmit a test facsimile message during the same call. FaxChek maintains that by demonstrating the failure of the three methods, the record amply demonstrates that providing a preamble in connection with its facsimile testing service is not technically feasible under the existing Group III standards.

7. As further support, FaxChek states that it markets its service only through detailed marketing materials containing full disclosure of costs and that facsimile machines are located primarily in business and commercial establishments. It notes that its service is not accessed by the general public and that, if a member of the public accidentally makes a non-facsimile call to the 900 service number, no charge will be assessed if the caller hangs up when he or she hears the facsimile signal tones. Finally, FaxChek points out that uncollectibles stemming from customer use of the testing service were six tenths of one percent in the second half of 1991.

8. We find that the request by FaxChek meets the waiver requirements established in *WAIT Radio v. FCC*.[4] The court stated that waivers must be founded on an appropriate general standard and held that "sound administrative procedure contemplates waivers... granted only pursuant to a relevant standard... |which is| best expressed in a rule that obviates discriminatory approaches."[5] The court followed *WAIT* in *Northeast Cellular Telephone Company v. FCC*. [6] In that case, the court held that a waiver is appropriate only if special circumstances warrant a departure from the general rule and the waiver will serve the public interest. The agency must articulate the nature of

[1] FaxChek's request was put on public notice. *Public Notice*, 6 FCC Rcd 7474 (1991). The parties who filed comments support the request.
[2] 6 FCC Rcd 6166 (1991); *petitions for reconsideration pending*.
[3] Letter from Mary Beth Richards, Chief, Enforcement Division, Common Carrier Bureau, to Richard R. Meyer, President, FaxChek Systems (December 5, 1991).
[4] 418 F.2d 1153 (D.C. Cir. 1969) (*WAIT*).
[5] *Id.* at 1159.
[6] 897 F.2d 1164 (D.C. Cir. 1990).

the special circumstances to prevent discriminatory application and to put future parties on notice as to its operation.[7]

9. The subject rule mandates a simple, brief preamble to inform consumers of essential information that they will need to make an informed purchase decision.[8] In the present case, FaxChek offers a specialized non-verbal service for which it is not feasible to provide a preamble. The Commission considered in the *Report and Order* the need for preambles on non-verbal pay-per-call programs, and concluded that there was insufficient evidence in the record that the technical difficulties were so great as to warrant a general exception.[9] Here, however, FaxChek has detailed the technical obstacles to providing a preamble for its specific program, and there is no evidence that there is a way to overcome those obstacles while maintaining the essential features of the service. Moreover, its service is not marketed to, and has no appeal to, the general public. FaxChek asserts, and the record does not contradict, that full written disclosure of rates is made to customers before they use the service. These claims are supported by the low uncollectible rate which this service has experienced. Therefore, we find that waiving the preamble requirement for this non-verbal service under these circumstances does not raise the concern that led the Commission to impose the preamble requirement, or otherwise deprive consumers of essential information necessary to make informed purchase decisions. Further, we find that a waiver will serve the public interest by making an innovative service available which could not be provided consistent with strict application of the preamble requirement.

10. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the request for waiver of the preamble requirement imposed in Section 64.711 of the Commission's rules filed by FaxChek Systems IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt, Chief
Common Carrier Bureau

[7] *Id.* at 1166.
[8] *See Report and Order*, 6 FCC Rcd at 6167.
[9] *Id.* at 6170.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IRWIN WALLACE, d/b/a WALLACE COMMUNICATIONS CONSULTANTS, and DREW METAL CORPORATION,
Complainants,

v. File No. E-88-116

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., and AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: May 14, 1992; Released: May 29, 1992

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. AT&T Communications of the Southern States, Inc., and American Telephone and Telegraph Company (hereinafter, collectively, "AT&T") have petitioned for reconsideration of the Commission's decision in this proceeding.[1] In the *Order*, the Commission held that AT&T violated Section 203 of the Act by flowing through the gross receipts tax to its Florida customers for approximately ten months before its gross receipts tax surcharge (GRTS) tariff went into effect (from about June 1, 1985 until April 24, 1986). The Commission determined that although it was proper for AT&T to flow through the Florida gross receipts tax, it should not have done so until its tariff providing for the GRTS flow through went into effect on April 24, 1986. However, the Commission agreed with AT&T that any damages that might have accrued for charges imposed by AT&T beyond the statutory two-year period of limitations specified in Section 415 of the Communications Act, 47 U.S.C. §415, are barred.[2]

2. In its petition for reconsideration, AT&T argues that the Commission erred in its holding that AT&T violated Section 203 of the Act. AT&T contends, moreover, that even if the Commission properly found a Section 203 violation, it erred in concluding that the Federal District Court in Florida, rather than the Commission, "has jurisdiction to decide whether and to what extent complainants are entitled to recover *damages* for a technical Section 203 violation that did not result in unreasonable or discriminatory charges." Petition at ii (emphasis in original).

II. DISCUSSION

3. We find that AT&T has not advanced any new arguments which would persuade us to modify our decision, and accordingly we deny the petition for reconsideration. AT&T's arguments that the Commission erred in finding a violation of Section 203 of the Act were, without exception, fully considered and rejected in the underlying order and require no further discussion here. However, AT&T's petition does raise for the first time the issue whether the Commission should decide whether and to what extent complainants may recover damages as a consequence of the violations.

4. AT&T argues that the Commission declined to reach the damages issues because it concluded that those issues had not been referred to the Commission and were matters for the United States District Court to decide. It argues that to the contrary, "the District Court referred the *entire* case to the Commission, including the issue of damages." Petition at ii (emphasis in original). According to AT&T, the "District Court retained jurisdiction only to the extent necessary to protect complainants' rights in the event that the Commission were *'unable* to fashion an appropriate remedy' after deciding the issues of violation and damages."[3] Moreover, AT&T maintains that complainants suffered no injury as a consequence of AT&T's actions and are therefore not entitled to recover damages.[4] AT&T requests that if the Commission does not vacate its Section 203 holding, it require complainants to produce evidence of losses suffered because of AT&T's conduct and decide the issue of damages itself.

5. Section 1.722(b) of the Commission's rules, 47 C.F.R. §1.722(b), provides that damages will not be awarded upon a complaint unless specifically requested. In the instant case, complainants are not requesting that the Commission determine damages. Indeed, complainants specifically stated that they "will look to the court for the award of damages and fees, if any, following resolution by this Commission...."[5] Complainants' Reply to Answer at 12. Accordingly, we reject AT&T's suggestion that the damages issue is properly before us. AT&T will have a full opportunity before the District Court, which specifically retained jurisdiction over the complaint, to present its argument that no damages should be awarded.[6]

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[1] 6 FCC Rcd 1618 (1991) (*Order*).

[2] The complaint was filed at the Commission as a result of a referral by the United States District Court, Middle District of Florida, Tampa Division (Case No. 87-1093-Civ-T-15(c)) (July 14, 1988). Complainants did not file the complaint in the United States District Court until July 31, 1987, more than two years after AT&T imposed the surcharge. The record reflects that AT&T charged and collected the gross receipts tax surcharge beginning about June 1, 1985, and ending April 24, 1986.

[3] Petition at 12, citing the court's Order of April 4, 1988 (emphasis added).

[4] AT&T's pleadings contain a lengthy argument to support its contention that complainants' theory of damages due them is wrong. Because of our action today, we need not summarize these arguments or complainants' opposition thereto.

[5] To the extent there was any ambiguity in Count 5 of the complaint, this statement resolved it.

[6] We note that both parties read more into footnote 5 of the *Order* than is warranted. Contrary to the parties' assertions, the Commission did not conclude that it did not have jurisdiction to decide whether and to what extent complainants are entitled to recover damages (AT&T's Petition at ii) nor did it "[rule] that Complainants are entitled to recover the overcharge" (Complainants' Opposition at 11). The Commission left to the District Court an issue that was not before the Commission and over which the court retained jurisdiction.

III. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to Section 405 of the Communications Act of 1934, as amended, 47 U.S.C. § 405, that the petition for reconsideration filed by AT&T IS DENIED.[7]

7. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be mailed forthwith to the Honorable William J. Castagna, Judge, United States District Court, Middle District of Florida, Tampa Division.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] Among the pleadings is this case is complainants' unopposed Motion for Leave to File Reply in Excess of Page Limitations. We grant that motion.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 1, 1992

PROCEDURES FOR FILING INFORMATIONAL TARIFFS BY OPERATOR SERVICES PROVIDERS

On December 4, 1990, the Commission released a public notice that established procedures for filing of informational tariffs by operator service providers (OSPs). For the convenience of the public, we now reiterate those procedures and attach a suggested format for informational tariffs.

Content of Filing: The Telephone Operator Consumer Services Improvement Act of 1990, 47 U.S.C. § 226, (TOCSIA) requires operator service providers to file and maintain informational tariffs. These tariffs must contain the carrier's name and business address and the effective date of the informational tariff on each page of the informational tariff. In addition, each informational tariff must specify

> rates, terms, and conditions, and including commissions, surcharges, any fees which are collected from consumers, and reasonable estimates of the amount of traffic priced at each rate, with respect to calls for which operator services are provided.

47 U.S.C. § 226(h)(1)(A). Informational tariffs should conform to the format attached to this Public Notice.

Informational tariffs should comply with the provisions of Sections 61.54 and 61.74 of the Commission's Rules, 47 C.F.R. §§ 61.54, 61.74. Charges should be stated in dollars and cents and should not include cross-references to any other document, except that informational tariffs may cross reference other documents containing rate center vertical and horizontal coordinate information for purposes of determining mileage.

TOCSIA does not require a public notice period before provisions of informational tariffs become effective. Therefore, Section 1.773 of the Commission's Rules, 47 C.F.R. § 1.773, shall not apply to these filings.

Who Must File: Each provider of operator services is required to file an informational tariff. TOCSIA defines "provider of operator services" as "any common carrier that provides operator services or any other person determined by the Commission to be providing operator services." 47 U.S.C. § 226(a)(9). TOCSIA defines "operator services" as

> any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than (A) automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer.

47 U.S.C. § 226(a)(7).

Filing Procedures: Informational tariffs should be filed pursuant to the provisions of Section 61.32 of the Commission's Rules, 47 C.F.R. § 61.32. These tariffs need not be accompanied by a formal Transmittal letter but should be accompanied by a cover letter explaining the purpose of the filing. In brief, Section 61.32 provides that the original of the carrier's letter should be addressed to the Secretary of the Commission and should be submitted, without attachments, along with FCC Form 155, and the appropriate fee to the Mellon Bank, Pittsburgh, Pennsylvania. A copy of the cover letter and the attachments should be submitted to the Secretary's Office; the Commission's contractor for public records duplication, Downtown Copy Center; and the Chief, Tariff Review Branch.

Any changes to the tariff should be submitted under a new cover letter with a *complete* copy of the tariff, including changes. The changes should be explained in the cover letter and need not be symbolized on the tariff pages. These documents should then be filed pursuant to the procedures stated above.

For further information contact Judy Nitsche at (202) 632-5550 or Kelly Cameron at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Approved by OMB
3060-0478

Expires May 31, 1994
Est. Avg. Hrs. Per Response: 50 Hrs.

ABC Company

Informational Tariff
Title Page

Interstate Operator Services

[Here describe briefly the services
included in this tariff.]

EFFECTIVE DATE

John Doe, Responsible Officer
ABC Company
123 Main Street
Anytown, USA

ABC Company

Informational Tariff
Page 1

Table of Contents

A. Terms and Conditions

1. Definitions
2. Rules and Regulations

B. Description of Service

C. Rates and Charges

D. Commissions, Surcharges, Fees

E. Estimates of Traffic

EFFECTIVE DATE

John Doe, Responsible Officer
ABC Company
123 Main Street
Anytown, USA

ABC Company Informational Tariff
Page 2

A. Terms and Conditions

[Here provide the rules and regulations associated with the use of this service.]

B. Description of Service

[Here provide the description of the service(s) to be offered under this tariff, including the points of service where service is made available.]

C. Rates and Charges

[Here provide the rates and charges to be applied to service. These must be stated in dollars and cents.]

D. Commissions, Surcharges, Fees

[Here provide the information required by Section 226 of the Communications Act, as added by the Telephone Operator Consumer Services Improvement Act of 1990.]

E. Estimates of Traffic

[Here provide the information required by Section 226 of the Communications Act, as added by the Telephone Operator Consumer Services Improvement Act of 1990.]

EFFECTIVE DATE

John Doe, Responsible Officer
ABC Company
123 Main Street
Anytown, USA

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Request For Temporary Redesignation of Prime Time for Television Station KCRA-TV, Sacramento, California

MMB File No. 910723A

ORDER

Adopted: May 22, 1992; Released: May 26, 1992

By the Chief, Mass Media Bureau:

1. On July 29, 1991, John S. Kelly, *et al.*, d/b/a Kelly Broadcasting Company ("Kelly"), licensee of station KCRA-TV, Sacramento, California, filed a petition requesting permission to use 6:00 - 10:00 p.m. as its prime time hours for purposes of the Commission's network television prime time access rule.[1] Kelly sought this authority for an 8 1/2 month period, in order to conduct an experiment regarding audience preferences for the broadcast of an earlier prime time schedule. The Commission granted Kelly's request on September 12, 1991, allowing KCRA to shift its prime time hours, as requested, during the period beginning September 16, 1991, and ending June 1, 1992.[2] The grant of Kelly's request was conditioned on Kelly's agreement to provide the Commission, within 60 days of the conclusion of the test period, with a detailed report of the results of the experiment.

2. On May, 15, 1992, Kelly filed a Request for Interim Extension of Temporary Authority ("Interim Request") and a Request for Extension of Temporary Authority ("Extension Request"). The Extension Request seeks the Commission's authorization to extend KCRA's experimental prime time shift for a period of one year or "until the end of any comparable temporary prime time redesignation approved for KRON-TV, whichever is longer."[3] Kelly submits that such an extension is necessary because the data regarding audience preferences collected to date are inconclusive, and additional time will be required in order for a clearer trend to develop. Kelly's Interim Request asks the Commission to grant a temporary extension, allowing KCRA to continue the experimental prime time shift, until a date thirty days following Commission action on the Extension Request. Kelly asserts that such a temporary extension is necessary to avoid the substantial and unnecessary public inconvenience and confusion that would result if Kelly were to revert to a 7:00 - 11:00 p.m. prime time schedule on June 1, 1992, only to revert back again to the earlier prime time schedule, if the Commission were to grant Kelly's Extension Request.

3. We agree that unnecessary viewer confusion and inconvenience would result, in the absence of a temporary extension allowing KCRA to continue the experimental prime time shift pending the Commission's decision with respect to Kelly's Extension Request. In view of the foregoing, we grant Kelly's Interim Request, and will allow KCRA to continue its experimental prime time shift until 30 days after the Commission issues a decision regarding Kelly's Extension Request.

4. Accordingly, IT IS ORDERED that the Request for Interim Extension of Temporary Authority filed by Kelly Broadcasting Company IS GRANTED for the period indicated above.

5. This action is taken pursuant to authority granted in Sections 4(i), 4(j) and 303(r) of the Communications Act of 1934, as amended, and delegated in Sections 0.204 and 0.283 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] 47 C.F.R. § 73.658(k) ("PTAR"). PTAR specifies, *inter alia*, that the prime time for stations located in the Pacific Time Zone is 7:00 to 11:00 p.m.

[2] *Memorandum Opinion and Order*, 6 FCC Rcd 5510 (1991).

[3] The Waiver Request filed by Chronicle Publishing Company, licensee of station KRON-TV, San Francisco, seeking a temporary waiver allowing KRON to shift its prime time schedule from 7:00 - 11:00 to 6:00 - 10:00 p.m. until June 1, 1993, is currently pending before the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-268

In the Matter of

Advanced Television Systems
and Their Impact upon the
Existing Television Broadcast
Service

SECOND REPORT AND ORDER/FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: April 9, 1992; Released: May 8, 1992

Comment Date: July 17, 1992
Reply Comment Date: August 17, 1992

By the Commission: Commissioner Duggan issuing a statement.

TABLE OF CONTENTS

Topic	Para.
I. INTRODUCTION	1
II. ELIGIBILITY, ALLOTMENT AND ASSIGNMENT ISSUES	4
A. Initial Eligibility	4
B. Unrestricted Eligibility	14
C. Television Multiple Ownership Rules	17
D. Network Rules	18
E. Application and Construction Periods	20
F. Allotment/Assignment Issues	31
III. SPECTRUM ISSUES	36
A. Noncommercial Allotments	36
B. LPTV and Translator Services	39
C. Broadcast Auxiliary Service	46
D. Other Spectrum Issues	47
IV. CONVERSION TO ATV	50
A. Timetable for Conversion	50
B. Switching Frequencies	56
V. SIMULCASTING	58
VI. PATENT LICENSING AND RELATED ISSUES	68
VII. OTHER ISSUES	70
A. Compatibility	70
B. Alternative Media	74
C. Closed Captioning	77
D. Audio Advances: Extensibility and an ATV Standard	78
E. New Developments	80
VIII. CONCLUSION	81
IX. PROCEDURAL MATTERS	82
A. Notice and Comment Provisions	82
B. *Ex Parte*	83
C. Regulatory Flexibility Act Statement	84
X. ORDERING CLAUSE	85
APPENDIX A: Initial Regulatory Flexibility Act Statement	
APPENDIX B: Final Regulatory Flexibility Act Statement	
APPENDIX C: List of Parties Filing Comments and Replies in MM Docket No. 87-268	
APPENDIX D: List of Unpublished Material Cited	
APPENDIX E: Glossary of Terms, Abbreviations and Acronyms	

I. INTRODUCTION

1. This *Second Report and Order/Further Notice of Proposed Rule Making* (*Order/FNPRM*) decides a number of critical issues, and seeks further comment on others, affecting implementation of advanced television (ATV) service in this country.[1] It is the fifth in a series of Commission actions since 1987 developing and refining our regulatory approach to ATV and leading to selection of a terrestrial broadcast ATV system.[2] In November 1987, the Commission established the Advisory Committee on Advanced Television Service (Advisory Committee), com-

[1] ATV refers to any television technology that provides improved audio and video quality or enhances the current television broadcast system. The existing broadcasting system is referred to as NTSC, after the National Television Systems Committee, an industry group established in 1940 to develop technical standards for television broadcasts. The term "ATV" includes both High Definition Television (HDTV) and Enhanced Definition Television (EDTV). HDTV systems aim to offer approximately twice the vertical and horizontal resolution of NTSC receivers and to provide picture quality approaching that of 35 mm film and audio quality equal to that of compact discs. EDTV refers to systems that provide more limited improvements over NTSC.

We have previously determined that we would not adopt an EDTV standard, if at all, prior to reaching a decision on an HDTV standard. We have also decided that an HDTV system that transmits the increased information of an ATV signal in a separate 6 MHz channel will allow for ATV introduction in the most non-disruptive and efficient manner. *First Report and Order*, 5 FCC Rcd 5627, 5627-29 (1990) (*First Order*). HDTV systems transmitting in this manner would not be receivable on conventional NTSC television sets without add-on converters.

[2] *Notice of Inquiry*, 2 FCC Rcd 5125 (1987) (*First Inquiry*); *Tentative Decision and Further Notice of Inquiry*, 3 FCC Rcd 6520 (1988) (*Second Inquiry*); *First Order*, *supra*; and *Notice of Proposed Rule Making*, 6 FCC Rcd 7024 (1991) (*Notice*). For a

prised of industry leaders from diverse sectors, including the broadcast, cable, computer, and manufacturing industries. Testing of six proponent ATV systems began at the Advanced Television Test Center (Test Center) in July 1991 and is currently progressing.[3]

2. We reach numerous decisions herein, the most significant of which are the following:

o We limit initial eligibility for ATV frequencies to existing broadcasters; however, we will allow others to apply for ATV allotments and licenses in communities where there are additional channels available.

o We adopt a two-year deadline for broadcasters to apply initially for a paired ATV channel, and a three-year deadline for construction of an ATV facility once assigned.

o We will consider all allotment issues and issue a draft Table of Allotments in June 1992.

o We decide (a) to use vacant noncommercial reserved channels only when no feasible alternative exists for assigning ATV channels to existing broadcasters and (b) to leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel.

o We maintain the secondary status of low-power television service stations vis-a-vis new ATV operations, but will also continue to permit displaced low-power service stations to file noncompetitive applications for another channel in the same community. We further conclude that low-power service stations should be free to broadcast in either the ATV or NTSC mode, and we plan to initiate a proceeding to consider whether some low-power television service interference protection rules should be changed in an attempt to mitigate some of the effects of potential displacement.

o We notify broadcasters that when ATV becomes and is designated as the prevalent medium, they will be required to "convert" to ATV, *i.e.*, surrender one of two broadcast channels and cease broadcasting in NTSC, and we conclude that we should set a firm date for conversion to ATV.

o We conclude that we should adopt a 100 percent simulcasting requirement at the earliest appropriate point.

o We will condition selection of an ATV system on a winning proponent's adoption of reasonable and nondiscriminatory patent licensing policies, but decline to take further action at this time.

o We encourage the ongoing work of the Advisory Committee on compatibility issues and generally decline to take additional regulatory action on these issues at this time.

o We direct the Advisory Committee to address new audio developments as well as proposals for flexible apportionment of audio and data in the selection of a system; the Committee is further requested to address any analogous calls for extensibility in an ATV system standard as they arise.[4]

3. We also seek comment on various issues, including:

o A proposal to rank the class of parties initially eligible for ATV frequencies in the event of a spectrum shortfall as follows: (a) licensees and permittees with constructed facilities and program test authority, (b) permittees with unbuilt facilities, and (c) applicants;

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fuller description of the history of this proceeding, see *Second Inquiry*, 3 FCC Rcd at 6521-6523 & n.15. *See also Notice*, 6 FCC Rcd at 7024.

We received 50 comments, six informal comments, 17 reply comments, and four informal reply comments in response to the *Notice* giving rise to our actions herein. Pleadings filed after the December 20, 1991 deadline for comments and the January 31, 1992 deadline for reply comments are treated respectively as informal comments and informal reply comments. We list the parties filing these pleadings, and the abbreviations we use for them, in Appendix C.

[3] Although six systems are being tested, the Advisory Committee will defer consideration of the only EDTV system tested until after a recommendation has been made on an HDTV system. The Advisory Committee then will consider the EDTV system only at its discretion. The EDTV system is Advanced Compatible Television (ACTV) proposed by the Advanced Television Research Consortium (ATRC, which is composed of the David Sarnoff Research Center, North American Philips, Thomson Consumer Electronics, NBC, and Compression Labs). Letter from James E. Carnes, President and Chief Operating Officer, David Sarnoff Research Center to Richard E. Wiley, Advisory Committee Chairman (Mar. 2, 1992), Letter from Richard E. Wiley to James E. Carnes (Mar. 5, 1992), *in* Fifth Interim Report of the FCC Advisory Committee on Advanced Television Service (Mar. 24, 1992) (Fifth Interim Report), Appendix B. (For the convenience of interested parties, reports of the Advisory Committee and Commission staff and other unpublished documents to which we refer herein are listed in Appendix D. These documents have been made part of the docket and are available in the Commission's public reference room. Copies are also available, for a fee, from the Commission's independent copy contractor, Downtown Copy Center, 1114-21st Street NW, Washington, D.C., 20036, (202) 452-1422.)

The other five ATV systems being tested are: (1) Narrow MUSE, proposed by NHK; (2) DigiCipher, by the American Television Alliance (ATVA, which is composed of General Instrument Corp. and MIT); (3) Digital Spectrum Compatible HDTV (DSC-HDTV), by Zenith/American Telephone and Telegraph; (4) Advanced Digital-High Definition Television (AD-HDTV), by the ATRC; and (5) ATVA Progressive System, by ATVA. Narrow MUSE is an analog HDTV system, and the remaining four are digital HDTV systems. Fourth Interim Report of the FCC Advisory Committee on Advanced Television Service at 4 (Apr. 1, 1991) (Fourth Interim Report); Fifth Interim Report at 6-7 n.6. The Test Center is conducting objective testing of the systems. Subjective video tests are being conducted at the Advanced Television Evaluation Laboratory (ATEL) in Ottawa, Canada, and audio tests are being conducted by Westinghouse Science and Technology Center. Testing is expected to be completed by November 1992, with additional field testing to follow. Fifth Interim Report at 15-16.

[4] We will issue a codification of the ATV rules we adopt herein, with appropriate effective dates, at a later point in this proceeding.

o A proposal to allow broadcasters a period of time to negotiate channel assignments prior to adoption of a Table of Allotments and, where broadcasters are unable to agree, to make channels available on a first-come, first-served basis;

o A proposal to temporarily suspend the dual network rule to permit networks to give their affiliates a second feed for ATV;

o A proposal to require low-power television service stations to convert to ATV at the point that full-service broadcast stations will be required to do so;

o Our tentative conclusions that (a) we should establish a firm date for conversion to ATV that is 15 years from either selection of an ATV system or the date a Table of ATV Allotments is effective, whichever is later, and (b) that we should review, in 1998, the propriety of the conversion date we will have set;

o Our tentative conclusion that we should impose a 100 percent simulcasting requirement no later than four years after the ATV application/construction period has passed, and on proposals for affording broadcasters some initial flexibility, including a proposal to "phase in" a full simulcasting requirement in two stages;

o The merits of Advisory Committee findings concerning new developments in ATV technology, including its findings that these new developments are not sufficiently concrete to allow timely testing and do not merit further consideration in selection of an ATV system.

II. ELIGIBILITY, ALLOTMENT AND ASSIGNMENT ISSUES

A. Initial Eligibility

4. As we have previously stated, "broadcast stations provide services unique in the array of entertainment and non-entertainment programs freely available to the American public."[5] Unlike other countries, the United States has an established system of privately owned broadcast stations that have an obligation to serve the public interest and in furtherance of that objective transmit news, information and entertainment programs of a local, regional and national nature. As we have stated, therefore, initiating an ATV system within this existing framework "will uniquely benefit the public."[6] In addition, because over-the-air broadcasting reaches more than 98 percent of U.S. households, an ATV terrestrial broadcast system is the medium most likely to bring this technological advance to virtually all Americans. Consequently, it is the medium most likely to result in rapid penetration of ATV receivers and, hence, to contribute to higher sales volumes and eventually lower costs for these receivers. We thus believe that the television broadcast industry should be given the opportunity to implement ATV, and we develop a regulatory approach for this implementation herein. We underscore, however, that our approach does not preclude, and indeed attempts to facilitate, provision of ATV services by alternative media.[7] By permitting the broadcast industry to make the transition to ATV, we ensure that all competitors in the local video services market can compete on this new technological level and, hence, that the public continues to enjoy the benefits that flow from such competition.

5. ATV represents a major advance in television technology, not the start of a new and separate video service. The *Notice* proposed to permit existing broadcasters to keep pace with this important technological development by restricting initial eligibility for ATV frequencies to them.[8] Most parties commenting on this issue agree, several noting in particular their concurring view that ATV is an enhancement of existing service and not a new video service and that additional spectrum is being used in this case to improve and expand services rather than to create a new class of service altogether.[9]

6. As we stated in the *Notice*, *Ashbacker Radio Corp. V. FCC*, 326 U.S. 327 (1945), requires us to give comparative consideration to all *bona fide* mutually exclusive applicants for a broadcast license. It does not, however, preclude our setting licensee eligibility standards.[10] Rather, the central

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[5] *Second Inquiry*, 3 FCC Rcd at 6525.

[6] *Second Inquiry*, 3 FCC Rcd at 6525.

[7] *See infra* Section VII.A, VII.B.

[8] *Notice*, 6 FCC Rcd at 7025; *Second Inquiry*, 3 FCC Rcd at 6537-38.

[9] *See, e.g.*, Westinghouse Comments at 2; ATSC Comments at 3. *But cf.* Golden Orange Comments at 2 (while reasonable to treat ATV as an improvement to existing service, once implemented, ATV could become a new distinct medium with NTSC continuing as a separate medium for broadcast programming not requiring high resolution). We disagree with Polar's suggestion that exclusion of low-power service stations from initial eligibility means that we are launching a new service. Polar Comments at 2. *See generally infra* Section III.B (discussing participation of low-power television service stations in ATV).

[10] *Notice*, 6 FCC Rcd at 7025. *See generally United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (hearing requirement of 47 U.S.C. § 309 does not limit the Commission's power to promulgate rules setting license eligibility criteria). *See also An Inquiry Into the Use of the Bands 825-845 MHz and 870-890 MHz for Cellular Communications Systems; and Amendment of Parts 2 and 22 of the Commission's Rules Relative to Cellular Communications Systems*, 86 FCC 2d 469, 483 (1981) (block of cellular radio frequencies restricted to wireline carriers for a period of years), *modified*, 89 FCC 2d 48, 69-77 (1982) (further limiting duration of set aside), *further modified in Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, 98 FCC 2d 175, 194-98 (1984) (reaffirming set aside, but redefining end of set aside period in each cellular market), *modified on other grounds*, 101 FCC 2d 577 (1985); *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part and denied in part*, 5 FCC Rcd 7094 (1990); *Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services*, 6 FCC Rcd 3488 (1991), *recon. granted in part and denied in part*, 7 FCC Rcd 1808 (1992) (adopting rules giving a dispositive "pioneer's preference" for new or innovative communications service).

Because we decide to impose a simulcasting requirement *infra* Section V, NCTA's concerns about the wisdom and legality of adopting an eligibility restriction without an associated simulcast obligation are moot. NCTA Reply Comments at 4 n.2.

issue is whether the nature and duration of any restriction on eligibility is in the public interest. As the *Notice* stated, and most commenting parties agree, existing broadcasters' continued involvement in ATV is the most practical, expeditious, and non-disruptive way to bring improved service to the American public.[11] Existing broadcasters possess the know-how and experience necessary to implement ATV swiftly and efficiently. They have invested considerable resources in the present system and represent a large pool of experienced talent. As initial participants in the transition to ATV, existing broadcasters will be making an appreciable capital investment in this new technology and will undertake the business risks associated with being in the forefront of such new developments. Indeed, the broadcast industry also has helped create and support the Advanced Television Test Center, investing resources and developing expertise in this new technology.

7. Moreover, the initial restriction will be for a period of two years only -- until initial assignments have been made.[12] Thus, the initial eligibility restriction will not indefinitely impede new entrants. Furthermore, after the initial ATV allotments and assignments are made, the table of ATV allotments may be expanded through the normal rule making process. Any additional channels would be open to all qualified parties.[13] Similarly, if a broadcaster failed to apply for and construct an ATV facility within the specified time, that broadcaster would lose initial eligibility for the assigned channel, which would then be open to competing applicants.[14] Finally, this eligibility restriction is, in the long-run, spectrally efficient. It enables us to award existing broadcasters an additional 6 MHz "conversion channel" on an interim basis, giving existing broadcasters the opportunity to move to ATV technology. At the time of conversion to ATV, we will be able to reclaim one of two 6 MHz channels --the "reversion channel"-- without abruptly disenfranchising television broadcast licensees. We thus find that limiting initial eligibility to existing broadcasters is in the public interest, and we adopt this restriction.

8. The *Notice* proposed to include the following in the class of existing broadcasters who would initially be eligible for ATV channels: (1) all full-service television broadcast station licensees, (2) permittees authorized as of the date of adoption of the *Notice*, and (3) all parties with applications for a construction permit on file as of the date of adoption of the *Notice* who are ultimately awarded full-service television broadcast station licenses.[15] The *Notice* also proposed various alternatives for assigning a channel where there is insufficient spectrum to accommodate all parties in a market, such as use of decisional criteria or a lottery pursuant to 47 U.S.C. § 309 (i).[16] There does not appear to be substantial dispute regarding the composition of the class of initially eligible parties where there is sufficient spectrum to accommodate all of the groups within the class.[17] Several parties, however, argue for ranking among the groups in case of insufficient spectrum.[18] In affording priorities in the event of insufficient spectrum, we agree with those commenters who would rank eligible parties according to their degree of experience as NTSC broadcasters. Such a rule would harmonize with our fundamental reason for initially restricting eligibility, to bring ATV to the public in the most expeditious and nondisruptive manner. It would do this by enabling those with relatively greater experience and expertise in broadcasting to deliver ATV service to the public first.

9. We thus propose to rank the eligible parties in the following order: (1) licensees and permittees with constructed facilities having program test authority,[19] (2) permittees, and (3) applicants. We do not propose, as Public Television suggests, to afford specific types of full-service broadcasters, such as noncommercial broadcasters, priority over other types in obtaining a second 6 MHz channel.[20] Determinations of whether the type of programming proposed by a licensee merits a special preference would be community-specific, depending on the community's existing services and its particular needs.[21] Making such determinations among the various licensees within a market would seriously impede the delivery of ATV service to the public in a timely fashion. In the case of insufficient spectrum to accommodate licensees and permittees with constructed facilities, in our proposed first-ranked group, we would apply some other method of deciding who would be assigned an ATV channel.[22] We seek comment on this proposal.[23]

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[11] *Notice*, 6 FCC Rcd at 7025. *See, e.g.*, EIA/CEG Comments at 5.

[12] *See infra* Section II.E.

[13] *See infra* Section II.B.

[14] *See infra* Section II.E.

[15] *Notice*, 6 FCC Rcd at 7025. For the sake of brevity, we sometimes refer to the class of those initially eligible for ATV frequencies as "existing broadcasters" or "existing NTSC licensees."

[16] *Notice*, 6 FCC Rcd at 7029.

[17] *See, e.g.*, Joint Broadcasters Comments at 12 & n.7. The one exception to this consensus is the argument that low-power service licensees should also be part of this class, which we deny *infra* Section III.B. Joint Broadcasters also ask that vacant allotments be paired with an ATV channel. We address the pairing of reserved noncommercial channels *infra*.

[18] *See, e.g.*, Joint Broadcasters Comments at 8; Westinghouse Comments at 3; Public Television Comments at 21; ATSC Comments at 4.

[19] *See generally* Brunson Comments at 2; Balcones Comments at 2; Brooks Comments at 2 (arguing that, because no further Commission authorization required under 47 C.F.R. § 73.1620 for permittee with constructed facilities to begin program testing, grant of a license may be mere formality). To the extent Brunson, Balcones and Brooks may also be arguing that all permittees, regardless of the state of construction of their facilities, should be afforded equal status with licensees, we disagree for the reasons given in the text.

[20] Public Television Comments at iv-v, 20-22. We intend, however, to allot ATV channels for vacant noncommercial channels where this does not preclude present delivery of ATV service by an existing broadcaster. *See infra* Section III.A.

[21] *Religious Broadcasting Network*, 3 FCC Rcd 4085, 4102 (1988).

[22] We defer resolving this question, and the question whether to apply the methods proposed in the *Notice* (use of decisional criteria or a Section 309 (i) lottery), or some other alternative, until our subsequent Report and Order deciding whether to rank initial applicants, as here proposed.

[23] We plan to satisfy MST's request for a list of all proposed eligible parties and their respective transmitter locations in our next Notice of Proposed Rule Making in this proceeding, which will solicit comment on a proposed Table of ATV Allotments. MST Reply Comments at 5. *See infra* Section II.F. We will also

10. After initial assignments are made, we propose to assign ATV channels to (1) parties ultimately awarded a construction permit based on an allotment petition pending as of the date of the *Notice*, regardless of whether or not the permittee had filed the original allotment petition; (2) parties awarded waivers of the current freeze on television broadcast applications in major markets and who are subsequently awarded an NTSC authorization; and (3) any other parties authorized to construct NTSC facilities in the interim period after adoption of the *Notice*.[24] These parties, having just been awarded broadcast facilities, have relatively less experience than the initially eligible group of broadcasters, and thus are relatively less likely to have the expertise to help speed ATV implementation. We thus propose to award these parties ATV channels only after the initially eligible group of broadcasters receives assignments. We seek comment on this proposal.

11. We will award existing broadcasters an additional license for the ATV conversion channel, in lieu of treating the addition of an ATV channel as a major modification to the NTSC license. Broadcasters will be operating two distinct facilities having different characteristics and, in many cases, transmitting from different locations. Treating the ATV and NTSC channels as separately licensed facilities will therefore simplify enforcement and administration. Golden Orange believes that if stations must ultimately surrender one of their two channels, rather than merely surrendering the NTSC channel, the stations should be permitted to sell that channel at an earlier point to recoup the cost of converting to ATV.[25] However, there are likely to be important broadcast and non-broadcast uses for surrendered spectrum.[26] Moreover, permitting the transfer of one channel of the pair to a third party for broadcasting purposes makes it impossible to recapture one 6 MHz channel and still leave existing television licensees with a broadcast outlet. Permitting such transfers could also threaten our goal of spectrum efficiency by possibly leading to widescale requests for relief from the requirement of surrender of one 6 MHz channel on the part of those who previously transferred one channel of the pair. We accordingly will not permit an NTSC license to be transferred independently of the associated ATV license, or vice versa.[27] We also decline to adopt suggestions that we permit use of the second channel for digital broadcast of multiple NTSC channels.[28] The reason we are awarding broadcasters a second channel is to permit them to move to an improved technology without service disruption. If a broadcaster chooses not to broadcast in ATV, there is no reason for awarding that broadcaster an additional license.

12. We also will not allow an applicant for an ATV construction permit to retain priority eligibility status if its NTSC license is not renewed or is revoked while its ATV application is pending. If either the broadcaster's NTSC or ATV license is revoked or not renewed, we will automatically revoke the remaining license.[29] In this way, we will insure that our goals in awarding broadcasters a second channel are preserved and that our goals in revoking or not renewing a license are not undermined. Permitting broadcasters to continue on their NTSC channel alone would also make the viewing public more reluctant to purchase an ATV receiver, for fear that they will be unable to receive maximum utility from their added equipment investment. Permitting broadcasters to continue transmitting their signals in ATV alone, in turn, jeopardizes our goal of graduating the transition to ATV so that consumers are not abruptly deprived of the use of their NTSC receivers. We therefore will not permit those initially eligible for ATV frequencies to retain either the NTSC or ATV license if one of them is revoked or not renewed.

13. We recognize, however, that permitting an unpaired ATV channel to broadcast during the transition to full ATV conversion implicates another objective, that of spectrum efficiency, by permitting the recapture of the NTSC reversion channel.[30] Thus, we will consider permitting the voluntary surrender of an NTSC channel by a broadcaster awarded a corresponding ATV channel on a case-by-case basis, considering in particular whether ATV receiver penetration in the affected community demonstrates that consumers largely will not be prematurely deprived of the use of their NTSC receivers.

B. Unrestricted Eligibility

14. As stated in the *Notice*, once ATV allotments for initially eligible parties are made, there is no reason to continue limiting eligibility for ATV frequencies.[31] Therefore, after an allotment table is adopted, we will permit any qualified party to file a petition for rulemaking to modify the ATV allotment table to add new ATV frequencies where they are technically feasible. In addition, we will permit any qualified applicant, not just existing broadcasters, to apply for an ATV frequency when an NTSC licensee fails to apply for and construct an ATV facility or to apply within the required time. As EIA/CEG suggests, open eligibility at such point will provide an

address at that time whether and how to freeze the pool and locations of existing transmitters (*see* Joint Broadcasters Comments at 14), whether to impose a freeze for planning purposes on modifications of existing licenses (*see* MST Reply Comments at 5-6), and whether to delete commercial NTSC allotments for which no applications are pending (*see* dLR Comments at 2).

[24] *Notice*, 6 FCC Rcd at 7025-26 & n.22. *See generally* ATSC Comments at 2, 4; Joint Broadcasters Comments at 8, 12 n.7, 14, introduction 1-2. We will cease issuing new NTSC licenses once ATV assignments to existing broadcasters are made. *See infra* Section IV.A.

[25] Golden Orange Comments at 10.

[26] *See infra* Section IV.A.

[27] *Notice*, 6 FCC Rcd at 7026. *See also* EIA/ATV Committee Reply Comments at ii, 5. We also will not permit noncommercial stations to sell their ATV licenses on a non-reserved basis, even if the proceeds are used only to improve their NTSC operations or facility. Golden Orange Comments at 8-9. As Public Television stresses, sale of reserved channels to alleviate short-term economic difficulties would deprive future generations of the benefits of public television and defeat the purpose of the reserve. Public Television Reply Comments at 1-3. Moreover, sale of a licensee's second channel may deprive the broadcaster of a means of making the transition to ATV.

[28] Blonder Comments at 1-2.

[29] *Notice*, 6 FCC Rcd at 7027.

[30] We will of course permit a party awarded an ATV license not associated with an NTSC channel pair to broadcast only on its assigned ATV channel. Its broadcast helps bring new entrants into the field, enhancing diversity, and helps spur ATV implementation by expanding the ATV broadcast outlets available to the public.

[31] *Notice*, 6 FCC Rcd at 7026. *See also* Joint Broadcasters Comments at 13.

additional impetus to ATV implementation.[32] Existing broadcasters who fail to apply or construct in the initial priority stage will be allowed to apply for any channels which subsequently remain available on the same basis as any other qualified parties and will be given no special priority.

15. Beyond pairing ATV channels to those awarded NTSC authorizations in the interim period prior to the time initial ATV assignments are made, we decline to establish any new priorities for eligibility once initial ATV allotments are made. We have restricted initial eligibility to the group we conclude most likely to implement ATV quickly. We are reluctant to expand our restriction to include others who, while offering valuable services in other respects, do not appear as a class likely to spur ATV implementation in the same fashion. We thus decline requests to afford low power and translator service or noncommercial interests priority status at such point. After the time for applying for an ATV channel has passed -- two years after the date adoption of an ATV standard or of a Final Table of ATV Allotments becomes effective, whichever is later -- eligibility will be completely unrestricted.[33] An additional eligibility restriction imposed at this stage would only narrow unnecessarily the group of potentially ready, willing and able entrants who may seek to apply for and deliver ATV service to the public expeditiously.[34]

16. In addition, ATV licenses will be subject to competing applications filed during the appropriate renewal window. As proposed in the *Notice*, we will issue ATV licenses for periods concurrent with the license of the associated NTSC station (if any). License periods for all ATV licenses, whether or not associated with an NTSC channel, will be determined in accordance with 47 C.F.R. § 73.1020.

C. Television Multiple Ownership Rules

17. As the *Notice* proposed, we will suspend application of the television multiple ownership rules, 47 C.F.R. § 73.3555, for ATV stations on a limited basis.[35] Most parties commenting on the issue agree that such suspension is necessary.[36] We thus will permit existing licensees that are awarded an additional ATV channel to hold both their NTSC and ATV licenses, even though their signals overlap, and to permit group owners to hold both NTSC and paired ATV channels, even though nationwide ceilings may be exceeded, until such time as existing licensees are required to convert to ATV service exclusively.[37] Our decision to establish a "use or lose" application/construction deadline should eliminate the potential for anticompetitive construction delays which FTC hypothesizes could develop from lifting the rules.[38] Since a broadcaster must complete construction of its ATV facility within a specified time or forfeit its right to use the channel, a broadcaster will be unable to prevent others from being awarded the channel while the broadcaster itself delays construction of an ATV station. Limited suspension of the multiple ownership rules is an essential component of our regulatory approach to ATV implementation, and we therefore adopt it.[39]

D. Network Rules

18. CapCities requests suspension of the dual network rule,[40] which prohibits a network from simultaneously operating more than one network of television stations in identical or overlapping geographic areas.[41] According to CapCities, suspension would permit a network to operate both an NTSC and ATV network during the transition to ATV. CapCities also asks that any suspension allow a network to affiliate with a new ATV station if its NTSC affiliate fails to be awarded an ATV facility.

19. Temporary suspension of the dual network prohibition would appear to facilitate a smooth transition to ATV. In light of our simulcast requirements,[42] broadcasters will be airing much of the same programming on their ATV and NTSC channels. During the transition to ATV, the networks will necessarily have to program their affiliates' two stations. Moreover, the networks are likely to be an early source of ATV programming on which existing affiliates will want to rely. Permitting the networks to supply their affiliates with ATV programming thus is likely to contribute to expeditious delivery of ATV programming to the public. We therefore propose to suspend the dual network prohibition to permit networks to give their affiliates a second feed for ATV. We seek comment on this proposal.[43] We also seek comment on whether the suspension should extend to circumstances where a network's two feeds (ATV and NTSC) go to *different* licensees in a market,[44] and if so, if any additional regulatory steps would be required in such case.

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[32] EIA/CEG Comments at 7.

[33] *See infra* Section II.E.

[34] *See, e.g.*, CBA Reply at 4; Polar Comments at 3; Polar Reply at 6; Public Television Comments at 16 n.13.

[35] *Notice*, 6 FCC Rcd at 7026. These rules prohibit the award of licenses for TV broadcast stations that result in an applicant directly or indirectly owning, operating or controlling (1) two TV stations with overlapping grade B contours, (2) more than 14 television stations, or 12 stations which are not minority-controlled, and (3) TV stations which have an aggregate national audience reach exceeding 30 percent, or which reach exceeds 25 percent and are not minority-controlled.

[36] *See, e.g.*, Joint Broadcaster Comments at 13 n.18.

[37] The acquisition or award of an ATV channel that is not part of an ATV/NTSC pair, however, would still be subject to the multiple ownership rules.

[38] *See infra* Section II.E; FTC Reply Comments at 13-15.

[39] We note that the Commission is statutorily prohibited from expanding any of its appropriated funds "to repeal, to retroactively apply changes in, or to begin or continue a reexamination of the rules and policies established to administer such rules of the Federal Communications Commission as set forth at Section 73.3555(c) of Title 47 of the Code of Federal Regulations." Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 782, 797 (1991). Section 73.3555(c) prohibits ownership of a broadcast station and a daily newspaper in the same market. This prohibition on its face does not apply to limited suspension of the broadcast/newspaper cross-ownership rule. Moreover, there is no indication that Congress intended to preclude grandfathered televison/newspaper combinations from participating on the same basis as all other television licensees in the transition to ATV.

[40] CapCities Comments at 2.

[41] 47 C.F.R. § 73.658(g).

[42] *See infra* Section V.

[43] We also emphasize that any such suspension would be transitional only and would be expressly limited to permitting networks to provide an ATV feed.

[44] This situation might occur during the ATV transition, for

E. Application and Construction Periods

20. The *Notice* proposed that existing broadcasters would have the right to apply for a particular ATV frequency on a priority basis for three years from the time that an ATV allotment table is adopted. We also proposed to apply a two-year restriction on the time within which a broadcaster must construct a new ATV facility or forfeit its construction permit, analogous to the two-year period applicable today.[45] Commenters are divided on these proposals. Most parties agree that a three-year application period is reasonable.[46] Many, however, urge either deferring or extending the time period for construction.[47]

21. We believe it is critical to our goal of bringing ATV to the American public quickly that we establish definite application and construction deadlines and that we give parties notice of such deadlines at this early stage.[48] We are concerned that without such a specific timetable, some parties may unduly delay construction while waiting for others to take the lead, to the detriment of our goal of expeditious ATV implementation.[49] We are also unpersuaded that deferral of a decision on such deadlines will enable us to obtain the information which some parties believe is essential to this decision, and which we now lack. For example, although lack of revenue forecasts is given as a reason to defer decision, no party convinces us that such data will become available within a reasonable period of time.[50] Moreover, even if such forecasts were negative, such data would not necessarily lead us to extend our application and construction periods, as opposed, for example, to opening eligibility to others financially better able to sustain ATV operations. Our decision today will give all broadcasters ample notice of the time periods that will apply. Those broadcasters who do not apply and construct within this time (and who fail to obtain an extension of time) will lose their initial eligibility for an ATV frequency. These broadcasters may apply at a later time for an ATV channel on an equal basis with other applicants. Accordingly, we find it unnecessary to defer our decision on application and construction deadlines or extend them beyond the total five-year period proposed.[51]

22. Nevertheless, we believe that we should make an adjustment to the relative lengths of the application and construction periods from those which we proposed. Upon further reflection, we do not believe that broadcasters will need a full three-year application period to arrange their financing and plan their facilities from the time an order selecting an ATV system becomes effective. Rather, we conclude that a two-year application period will be sufficient. As Island observes, this proceeding has been pending since 1987, at the initiation of a broadcast industry group.[52] With adoption of this decision, broadcasters will have ample notice of the precise deadlines applicable to them before the application period begins to run. Broadcasters obtaining an assignment as a result of negotiations with other parties in the market,[53] having explored potential implementation difficulties before agreeing to a pairing plan, should not need an extended time for submitting an application for that channel. Moreover, broadcasters who are unable to reach a negotiated settlement will have an incentive under the first-come, first served approach to apply for an ATV channel early.[54] Accordingly, adopting a two-year application period should not impose an undue burden on existing broadcasters. Moreover, a two-year period will further ensure that incumbent broadcasters take advantage of their initial eligibility priority in a timely fashion and that ATV channels are opened up to new entrants within a reasonable period of time.

23. At the same time, we recognize that broadcasters will be in the vanguard of those implementing ATV technology. As a result, the necessary equipment for transmission and production will have to be newly developed. Licensees will need time to solve the unique problems that pioneering construction of an ATV facility may raise.[55] Accordingly, we will permit broadcasters an additional year from that proposed, for a total of three years, for construction of an ATV facility. In light of the modification we make to the application period, this additional year for construction will not delay the ultimate availability of ATV service to the public.

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example, if a network's NTSC affiliate fails to apply for, to be awarded, or somewhow forfeits the right to interim use of, a second ATV conversion channel.

[45] *Notice*, 6 FCC Rcd at 7027.

[46] *See, e.g.*, Joint Broadcasters at introduction 2, 16; MST Reply Comments at 6-7; Westinghouse Comments at 4; Zenith Reply Comments at 2. *But see* Polar Comments at 4.

[47] *See, e.g.*, Joint Broadcasters Comments at introduction 2, 16; Westinghouse Comments at 4; MST Reply Comments at 6-7; ATSC Comments at 3; Fleet Call Reply Comments at 4-5 (all arguing for deferral); Golden Orange Comments at 4 (advocating doubling periods); FTC Reply Comments at 17 (arguing for longer period).

[48] *See generally* EIA/ATV Committee Reply Comments at 6.

[49] *See generally* FTC Reply Comments at 15-16 (describing "excess inertia" or market failure in which a technological advance never receives consumer acceptance, a phenomenon generally characterized by a small installed base of equipment and a new technology that is more expensive than the old). Although the FTC appears to be more concerned that parties may construct prematurely, as opposed to unduly delaying construction, our understanding of the industry we regulate leads us to reach a different conclusion. *Cf.* Joint Broadcasters Comments at 16 (citing example of DBS, where we initially allowed six years for construction and where, ten years later, the first DBS system is not yet launched).

[50] MST Reply Comments at 8-9.

[51] Moreover, should we decide to adopt one of the current proposals not to impose a simulcasting requirement until some time after the initial application/construction period has elapsed, this would give broadcasters an incentive to apply and construct substantially before the deadlines we impose have run. *See infra* Section V. By commencing operations early, broadcasters would have an opportunity to experiment with this new mode of transmission, to enjoy full flexibility regarding ATV programming, and to garner any additional revenues which different ATV programming may generate, before simulcasting restrictions become applicable. These same incentives would operate regardless of the particular methodology we adopt for assigning channels.

[52] Island Comments at 2-3; Island Reply at 6.

[53] For a discussion of our proposed channel assignment approach, see Section II.F *infra*.

[54] *See infra* Section II.F.

[55] Implementation Subcommittee Fifth Interim Report to the FCC Advisory Committee on Advanced Television Service (Implementation Fifth Interim Report) at 7-8 *in* Fifth Interim Report, Appendix I (noting that, although a two-year construction period is reasonable in the abstract, "[f]ew, if any, stations will achieve the minimum implementation time" in practice).

24. We also clarify that we intend to apply our existing definition of "construction" in this context.[56] Thus, a broadcaster will be deemed to have constructed an ATV facility if it has the capability of emitting ATV signals, regardless of the source of these signals (*e.g.*, local origination, pass-through of a network signal, or other signal). Studies of the cost of ATV broadcast implementation indicate that studio conversion costs are likely to be substantial.[57] By leaving the timing of full studio conversion more to the broadcaster's judgment, broadcasters will be able to "phase-in" full ATV implementation as their individual circumstances and markets permit. At the same time, requiring transmission capability by a date certain ensures that valuable spectrum will not lie fallow and that the benefits of technological advances will be made available to the public promptly.

25. We underscore that the ATV application/construction time period will begin to run from the date that a Report and Order adopting a Table of Allotments or selecting an ATV system becomes effective, whichever is later. We expect that many of the asserted uncertainties regarding ATV construction that are raised today will be clarified at the point an ATV system is actually selected. However, we note that for each individual applicant, the construction period will begin to run from the actual time that a construction permit is awarded. In this way, we may appropriately compensate for time needed for application processing by Commission staff.[58] Moreover, we can ensure that those who are awarded frequencies at a relatively early point also complete construction at a commensurately early date.

26. Finally, not only are we allowing an additional year for construction beyond that currently permitted in our rules,[59] but our existing policies regarding extensions of time will afford broadcasters adequate flexibility to cope with unforeseen implementation problems. Our rules permit extensions of time to construct where (1) construction is complete and testing is underway; (2) substantial progress in construction has been made; or (3) reasons clearly beyond the permittee's control have prevented progress in construction, but the permittee has taken all possible steps to expeditiously resolve the problem and proceed with construction.[60] We will apply these rules to grant extensions in appropriate circumstances.[61]

27. For example, some speculate that local zoning problems, pendency of FAA, FCC or other necessary government approvals, or litigation directly affecting our ATV rules will unavoidably delay ATV construction.[62] Our existing rules, however, would provide relief in such circumstances.[63] Similarly, some hypothesize that transmission and production equipment may not be available in a timely fashion. Our existing rules again would permit appropriate extensions.[64] If unavoidable difficulties occur in locating an appropriate ATV transmitter site, our existing rules also provide sufficient relief.[65] With respect to

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[56] *See generally* FCC Form 302. We believe that the more liberal definition suggested by Working Party 1 of the Implementation Subcommittee (IS/WP1) would not be feasible to administer and would not serve our goal of speedy implementation of ATV. Implementation Fifth Interim Report at 4. IS/WP1 advocates use of various indicia of a licensee's good faith intent to build, such as executed contracts for syndicated programming of ATV quality, and, to the extent they require capital expenditure, believes that these actions "should be taken as indicia of irrevocable commitment to ATV implementation, warranting extension of any fixed construction deadline the Commission may set." Implementation Fifth Interim Report, *supra*, Attachment A at 6-7.

[57] *See, e.g.*, A CBS Work-in-Progress (Oct. 23, 1990, Preliminary Results) (CBS Study), at Figure 4 *in* Implementation Fourth Interim Report to the FCC Advisory Committee on Advanced Television Service (IS-0017) (Mar. 7, 1991).

[58] The Advisory Committee suggests that we process applications from large markets first. Fifth Interim Report at 12. We will, however, defer this issue until we have reached a decision on an allotment/assignment methodology. *See infra* Section II.F.

[59] 47 C.F.R. § 73.3598.

[60] 47 C.F.R. § 73.3534.

[61] We also intend to adhere to our existing policies defining "substantial" progress in construction. *See* 47 C.F.R. § 73.3534(b)(2). Substantial progress in construction has been interpreted to require *sustained* progress in the construction of a station. Although there is no maximum number of extensions allowed, demonstrable progress must occur during each extension period. *Benko Broadcasting Company*, 5 FCC Rcd 1301. As the indicia of substantial progress in construction stated in the rule suggest, substantial progress requires that a permittee demonstrate a firm commitment to construct. *See, e.g., Metrovision, Inc.*, 3 FCC Rcd 598 (Vid. Serv. Div. 1988)(extension denied where the only indication of recent progress in construction was equipment orders upon which deposits never had been paid).

[62] *See generally* Weiss Comments at 3-4 & n.2.

[63] *See, e.g.*, Weiss Comments at 3-4 & n.2. Our rule, 47 C.F.R. § 73.3534 (b)(3), specifically provides for an extension in the case of delay caused by unavoidable zoning problems. *See also* Letter from Video Services Division to Housatonic Broadcasting Company, Inc. (Aug. 4, 1988) (*Housatonic Letter)* (construction permit reinstated after permittee demonstrated difficulties it faced in locating a new site after Federal Aviation Administration and zoning approval problems made original site unavailable). We thus do not believe it necessary to take additional action to ensure that local governments do not block reasonable construction of new towers, as St. Clair suggests. St. Clair Comments at 2.

[64] *See, e.g.*, Fleet Call Reply Comments at 5; Westinghouse Comments at 4; Joint Broadcasters Comments at introduction 2, 16; Polar Comments at 4; Golden Orange Comments at 3; Weiss Comments at 3-5. 47 C.F.R. § 73.3534(b)(2) specifically states that a permittee's demonstration that equipment is on order is one indicia of substantial progress in construction. So long as a permittee's efforts at construction have been sustained, an equipment purchase order for which timely delivery is impossible normally is sufficient grounds for the extension of a construction permit. *Compare Benko Broadcasting Company, supra* (grant of extension warranted where original transmitter had to be returned to the manufacturer because modification application specified different equipment), *with Golden Eagle Communications, Inc.*, 6 FCC Rcd 5127 (1991), *recon. denied*, 7 FCC Rcd 1752 (upholding denial of fifth extension request in spite of permittee's deposit with equipment suppliers where permittee failed to demonstrate sustained efforts at construction or circumstances beyond its control).

[65] Polar Comments at 4; Weiss Comments at 4-5; St. Clair Comments at 13; Joint Broadcaster Comments at 19-21 n.13 (citing difficulties faced by licensees located at World Trade Center in New York City); *see also* IS/WP2 Report at 7-10. *See, e.g., Housatonic Letter, supra; F.B.C. Inc.*, 3 FCC Rcd 4595 (M.M. Bur. 1988) (extension granted where permittee promptly made efforts to obtain a new site, even though these efforts did not include the actual purchase or lease of alternative sites); Letter From Roy J. Stewart, FCC Mass Media Bureau Chief, to Southwest MultiMedia Corp. (Sept. 21, 1990) (construction permit extended and assignment granted, where, *inter alia*, tower lease terminated and permittee had negotiated another lease and

publicly-funded stations, we note that government budgetary processes can present uncontrollable circumstances specifically justifying an extension in our rules.[66] This policy thus provides sufficient flexibility for public television stations that may experience delays in obtaining government appropriations to transition to ATV.[67]

28. We thus believe that this policy on extensions affords sufficient relief to parties in unforeseen and uncontrollable circumstances. Given this policy, and the additional flexibility created by our continuing to limit the construction requirement to the ability to emit an ATV signal alone, we conclude that it is unnecessary either to extend the total time allowed for application or construction, or to undertake additional regulatory initiatives, to provide reasonable and equitable relief in extenuating circumstances.[68] On the other hand, given the many unknown factors likely to be part of early ATV implementation, we do not believe it advisable, as Island advocates, to employ a more stringent standard than we now apply to broadcasters.[69]

29. Our present rules generally do not permit an extension for inability to obtain financing.[70] Contrary to the views of some commenters, we see no reason to modify this rule for initial ATV implementation or to defer our decision on construction periods based on concerns about future ability to obtain financing.[71] Adequate financing is critical to prompt construction. One reason we are assigning ATV channels to existing broadcasters is our belief that they are the group most likely to have the incentive and the resources to implement ATV in an expeditious fashion.[72] A broadcaster's inability to obtain adequate capital, therefore, will only be considered relevant under extraordinary circumstances.

30. We also decline to make ATV receiver penetration a factor in granting construction permit extensions or extending application/construction time beyond five years.[73] The availability of ATV programming to the public is likely to be a major factor driving ATV receiver penetration.[74] Unless broadcast stations are transmitting ATV programs, such programming is unlikely to be available in sufficient quantity to stimulate receiver sales. We therefore believe that broadcast transmission is likely to be a precondition for substantial receiver penetration. Thus, we cannot allow receiver penetration levels to be a factor justifying a failure to construct an ATV station in a timely fashion or moving us to extend generally the application/construction time period.[75]

F. Allotment/Assignment Issues

31. For the past several years, the Commission's Staff has been examining various approaches and methodologies for developing allotments for ATV.[76] These efforts have been used to support the Commission's preliminary positions regarding retention of reserved channels for noncommercial stations and full accommodation of existing TV stations.[77] These studies also have provided guidance on critical spectrum parameters to ATV system designers and have aided the Advisory Committee's work in this area.

32. In the *Notice*, we sought comment on general spectrum matters and two main alternatives for the initial assignment of ATV channels, including a proposal to assign channels on a first-come, first-served basis, and a proposal to also permit private negotiations among licensees for particular channels.[78] Most commenting parties

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ordered transmitter). *But cf. New Orleans Channel 20, Inc.*, 100 FCC 2d 1401 (M.M. Bur. 1985), *rev. denied*, 104 FCC 2d 304, 313 (1986), *aff'd*, 830 F.2d 361 (D.C. Cir. 1987) (extension request denied after determination that the permittee's change in transmitter site was based merely on the business consideration that competition had developed from the addition of independent UHF station at the original site).

[66] 47 C.F.R. § 73.3534 (b)(3).

[67] Joint Broadcasters Comments at 23; Public Television Comments at 25.

[68] *See, e.g.*, Golden Orange Comments at 4, 13 (advocating longer period); St. Clair Comments at 3 (advocating that Commission establish rules ensuring that landlords do not profit from increased demand for transmitter space, and that the government formulate a special policy for transmitter sites located on government land); Joint Broadcasters Comments at 21, 3 9 (urging that we mandate ATV capability in all or a segment of receivers and make cable carriage mandatory); Weiss Comments at 6-7 (advocating sliding scale so that those who apply earliest get longer period to build, while those who apply later get shorter construction times).

[69] Island Comments at 4; Island Reply Comments at 4 (arguing for a strict standard such as that expressed in 47 C.F.R. § 22.43(b) of the cellular radio service rules). *Cf.* Telemundo Comments at 10 (arguing that a stricter standard should be applied to extension requests for full-power and LPTV construction permits).

[70] *Revision of FCC Form 301*, 50 RR 2d 381 (1981). *See L.E.O. Broadcasting, Inc.*, 2 FCC Rcd 1810 (Vid. Serv. Div. 1987) (extension request denied because permittee had not taken all possible steps to obtain alternative financing and complete construction, even though permittee's loss of financing was caused by the collapse of its bank). *But cf. Horseshoe Bay Centex Broadcasting Co.*, 5 FCC Rcd 7125 (1990) (extension granted where *committed* financing from a bank was rescinded as a direct result of lending restrictions imposed by the FDIC during a state-wide recession, and diligent efforts were made to obtain alternative financing and to begin construction).

[71] *See, e.g.*, MST Reply Comments at summary 1, 6-9. *See also* Polar Comments at 4.

[72] *See supra* Section II.A.

[73] Joint Broadcaster Comments at 22.

[74] EIA/CEG Comments at 5; ATSC Comments at 6; Philips Comments at iii.

[75] *Cf.* FTC Reply Comments at 16-17 (while advocating longer construction period, acknowledging that construction deadline might solve problems of "excess inertia," *i.e.*, where a new technology never achieves consumer acceptance). See also discussion on projected receiver penetration *infra* notes 156, 164.

[76] *See* "Memorandum of Understanding," (dated Nov. 14, 1990) between the FCC, the Advisory Committee and the ATV testing laboratories (Test Center and CableLabs). Under this agreement, the FCC assumed the responsibility for ensuring that channels are available for ATV service in a timely manner. The FCC also agreed to "take all necessary steps, including the development of analytic tools, to prepare an allotment table and/or assignment plan for ATV channels."

[77] *See* Interim Report: Estimate of Availability of Spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands, OET Technical Memorandum FCC/OET TM88-1 (Aug. 1988) (1988 OET Study); Analyses of UHF TV Receiver Interference Immunities Concerning Advanced Television, OET Technical Memorandum FCC/OET TM88-2 (Aug. 1988); and Interim Report: Further Studies on the Availability of Spectrum for Advanced Television, OET Technical Memorandum FCC/OET TM89-1 (Dec. 1989) (1989 OET Study).

[78] *Notice*, 6 FCC Rcd at 7027-29.

endorse an allotment/assignment approach that matches specific ATV channels with existing NTSC allotments.[79] Broadcasters generally believe it is essential that ATV channels be assigned by the time an ATV standard is selected and that existing sites be taken into account in the assignment process.[80] Parties disagreed, however, on the approach to be used to pair specific NTSC and ATV channels within a community.[81] Most parties support a policy permitting pre- or post-assignment negotiations among licensees in a given community as an extension of the Commission's normal allotment and assignment processes.[82] The Joint Broadcasters also oppose an approach in which ATV channels would first be allotted to communities and then made available for broadcasters on a first come, first-served basis.[83] EIA, on the other hand, supports such a firstcome, first-served procedure, stating that it would be the most expeditious means for implementing ATV.[84]

33. The Advisory Committee has recommended that we adopt an ATV allotment/assignment scheme contemporaneously with adoption of an ATV standard, consider a site-specific assignment plan in order to promote colocation of ATV and NTSC antenna sites, and clearly define our methodology for making ATV assignments as expeditiously as possible.[85]

34. We share the concerns of commenting parties that it is essential that an allotment/assignment process be in place at the time the ATV standard is adopted, and that the allotment and assignment methodology be defined as rapidly as possible. We intend to address all allotment matters related to the introduction of ATV in a separate Further Notice of Proposed Rule Making in June of this year. This action will set forth proposed technical and policy principles and scientific and engineering concepts to be used in the allotment of ATV channels. A draft Table of Allotments based on these principles and concepts will also be included. We are aware that the Advisory Committee has also undertaken work in the allotment and assignment areas. At an informal meeting with FCC staff on February 5, 1992, representatives of the Advisory Committee and other interested parties indicated that preliminary results from this work are expected this Spring. To the extent that this work becomes available, we will give it due consideration in developing our allotment and assignment proposals.[86]

35. We continue to believe that negotiations among broadcasters should be an integral part of the ATV assignment process. Such an approach will ensure the most expeditious and efficient implementation of ATV service to the public. Accordingly, we have developed the following revised proposal for the initial assignment of ATV channels. This proposal will ensure that assignment and licensing procedures are in place at the time the Commission adopts an ATV standard. Under this proposal, at the time the Commission issues a Further Notice proposing the Final Table of Allotments,[87] broadcasters would have a fixed period of time to negotiate with each other and submit plans for pairing NTSC and ATV channels either nationwide or on a market-by-market basis.[88] Both commercial and noncommercial stations would be permitted to participate in this negotiation.[89] Once the period for such industry negotiations ends, if there are markets remaining where broadcasters are unable to agree on a pairing plan, the channels in those markets would be assigned on a first-come, first served basis. In the case of simultaneously filed applications, we would apply a "random ranking" procedure, so that the top-ranked applicant would be granted its first choice, and the next-ranked applicant its highest choice that would not conflict with the first-ranked applicant, and so on. We do not agree with Joint Broadcasters that such a first-come approach would result in a "stampede" of applications, since broadcasters in many markets may reach negotiated settlements among themselves.[90] In addition, our selection of a three-year construction period, which will begin to run from the time a construction permit is awarded, should help ensure that broadcasters do not file for an ATV allotment until they are ready to construct. We seek comment on this proposed approach.[91]

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[79] *See, e.g.*, Joint Broadcaster Comments at introduction 1, 3-4, 5.

[80] *Id.* at introduction 1, 4 & n.1, 6-7.

[81] *Compare* Tribune Reply Comments at 2-4 (advocating replication of existing NTSC coverage area) *with* Paramount Reply at 1 (advocating equalizing disparities between UHF and VHF stations).

[82] EIA/CEG Comments at iii, 6; ATSC Comments at 4-5; Westinghouse Comments at 3-4.

[83] *See generally* Joint Broadcasters Comments at 11.

[84] *See, e.g.*, EIA/CEG Comments at iii, 7-8.

[85] Fifth Interim Report at 12.

[86] *See generally Ex Parte* Letter from Julian L. Shepard, Vice President and General Counsel, MSTV, to Donna R. Searcy, Secretary, FCC (Feb. 6, 1992).

[87] The Final Table of Allotments will be developed after comments on the June 1992 draft Table have been received and analyzed.

[88] To the extent possible, we would take into account any negotiated agreements made nationwide or within markets based on the sample Table of Allotments in preparing a proposal for the Final Table of Allotments/Assignments.

[89] Public Television is concerned that financially strapped noncommercial stations would be unable to refuse lucrative offers to trade their assignments. Public Television Comments at 18-19. This concern, however, appears to be directed to post-assignment negotiations, in which a station could exchange a valuable entitlement to a channel, and not to the pre-assignment negotiations we are here proposing, in which no party yet has any rights to particular channels. We also observe that we currently permit commercial-noncommercial intraband channel exchanges where the proceeds, if any, are used by the noncommercial licensee in the operation of its station. *Amendments to the Television Table of Assignments to Change Noncommercial Educational Reservations*, 59 RR 2d 1455, 1464 (1986), *on recon.*, 3 FCC Rcd 2517 (1988), *aff'd sub nom. Rainbow Broadcasting Co. v. FCC*, 949 F.2d 405 (D.C. Cir. 1991).

[90] A first-come approach is also not inconsistent with the two-year application period which we will apply.

[91] Our reluctance to propose a specific pairing of ATV and NTSC channels stems from several considerations. If, on a market-by-market basis, we were to attempt to match the existing NTSC stations with the pool of feasible ATV channels on an equivalent service basis, we believe that we would encounter a significant number of cases in which an acceptable degree of equivalency simply does not exist. The presence of existing stations causes significant variations in the size and shape of both NTSC and prospective ATV service; it is this variability which would frustrate, we believe, a simple matching scheme. Further, we note that relying on the principle of existing service would require that a licensee with the smallest existing NTSC service be paired with the least attractive ATV channel. We are concerned whether all such licensees would be satisfied with such an arrangement. From a broader perspective, we

III. SPECTRUM ISSUES

A. Noncommercial Allotments

36. As the *Notice* stated, our spectrum planning with respect to the broadcast industry has traditionally taken into account the important role noncommercial stations play in providing quality programming to the public and the financial constraints they face in building and running their stations. Technical studies indicate that we can continue this tradition within an ATV allotment scheme. Accordingly, in the *Notice* we proposed that we would use vacant noncommercial reserved channels only as a last resort, to permit present delivery of ATV service, and moreover, would pair vacant noncommercial allotments with an ATV channel except where that would preclude present delivery of ATV service.[92]

37. Most parties commenting on the issue favor preserving the noncommercial reserve, with some noting that given the budgetary constraints confronting noncommercial stations, many such stations would require more time than their commercial counterparts to commence operations.[93] Most of those commenting on the issue also favor pairing ATV channels with vacant noncommercial allotments,[94] observing the unique role that public television plays in American broadcasting,[95] the difficulties noncommercial interests have in competing with commercial interests for spectrum, and the importance of such reservations in maintaining the ranks of stations dedicated to public television service.[96] Based on these comments, we conclude that we will use vacant noncommercial allotments for ATV only where there is no feasible alternative for assigning an ATV channel to an existing broadcaster. Similarly, we will leave vacant noncommercial allotments without an ATV channel pair only when there is no other practicable way to award an existing broadcaster an ATV channel.[97] We will in no event use a vacant VHF channel allotment reserved for noncommercial purposes for commercial ATV.[98] Moreover, only as a last resort will we delete a reserved channel, or use for commercial purposes an ATV channel that would otherwise be paired with a vacant noncommercial allotment, where that channel or allotment would be necessary to provide first noncommercial full-service Grade B coverage to a community.[99] As Public Television suggests, if it is impossible to pair an ATV channel with a vacant noncommercial allotment, we will protect the vacant allotment with both NTSC and ATV separation requirements, provided that ATV spacing is, as anticipated, less than or equal to NTSC spacings.[100]

38. Public Television also suggests that we designate relinquished NTSC channels as pairs for vacant noncommercial allotments.[101] However, at the point that NTSC channels must be relinquished by all broadcasters -- the point of conversion to ATV -- our transitional channel pairing scheme will have served its purpose and will be ended. Thus, there will be no need for pairing these noncommercial reserved channels at this point. Noncommercial as well as commercial stations will have returned to broadcasting on a single 6 MHZ channel.[102]

B. LPTV and Translator Services[103]

39. There is no doubt, as low-power/translator interests argue, that LPTV and translator services provide important benefits, serving minority[104] and specialized[105] audiences, providing locally-based services to communities,[106] and generally furthering diversity.[107] On the other hand, we are in the process of enabling full-service stations that, by definition, reach much wider audiences than LPTVs and translators, to bring ATV, a major technological advance in broadcasting, to these audiences on a second channel. In order to do so, these full-service stations will temporarily need a substantial allocation of spectrum. As the *Notice* stated, it will be a challenge to provide all full-service licensees with an additional 6 MHz for ATV. Accordingly, as we stated in the *Notice*, and the record confirms, if ATV is to succeed, it will be necessary for new ATV assign-

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believe that licensees will have their own reasons for preferring certain ATV channels and that these will vary from market to market. For example, one broadcaster may favor a particular ATV channel because it is close in frequency to its existing NTSC channel. Another broadcaster may desire a certain ATV channel because it may offer better coverage at the location where it intends to construct its ATV facility. A third broadcaster, currently operating in the VHF band, may prefer an ATV channel in the UHF band so that it would operate from a common antenna with other broadcasters. It is doubtful that this Commission could fashion a simple and efficient method which would automatically lead to the right outcome in each market.

92 *See* 1989 OET Study, *supra*. *See also Notice*, 6 FCC Rcd at 7029-30.

93 Joint Broadcasters Comments at introduction 4, 4; Public Television Comments at iii, 9-11.

94 Joint Broadcaster Comments at 9-10.

95 ATSC Comments at 5.

96 Public Television Comments at iii, 2, 13-14 & n.11.

97 In both cases, we would conduct such an evaluation of feasible alternatives on a case-by-case basis, including consideration of other practicable engineering solutions. *Cf.* Joint Broadcasters Comments at 9; Public Television Comments at iii, 9.

98 *See* P.L. No. 101-515, the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1991 (102 Stat. 2136-37, Nov. 5, 1990) (no funds appropriated to the FCC may be used to diminish the number of VHF channel assignments reserved for noncommercial educational television stations).

99 Joint Broadcasters Comments at 9 n.4; Public Television Comments at iii, 9-11.

100 Public Television Comments at 16 n.13.

101 Public Television Comments at 16 n.13.

102 *See infra* Section IV.A.

103 A low-power television station (LPTV) is a broadcast television facility with secondary service status that is authorized at maximum power levels lower than those of full-service television stations. Low-power stations may retransmit the programs of a full-service station and may originate programming. Translators are low-power stations that do not originate programming in excess of 30 seconds an hour and act to retransmit the signals of a full-service station. 47 C.F.R. § 74.701 (a), (f).

104 Telemundo Comments at summary page, 6; Communicasting Comments at 35; Channel 13 Comments at 1-2; KHR-TV14 Commentsat 1; Polar Reply at 3.

105 St. Clair Comments at 3; CBA Comments at 1-2.

106 CBA Comments at 1-2; Channel 13 Comments at 1-3; Communicasting Comments at 3-5.

107 Telemundo Comments at 5-6. *See also* Third Coast Comments at 1. Some parties observe that displacement would have a negative economic impact on existing investment and employment, *see* Telemundo Comments at 8-9; Communicasting Comments at 5-6, as well as small business, *see* Third Coast Comments at 2.

ments to displace LPTV and translator stations to some degree in the major markets,[108] although the impact is likely to be less severe in rural areas where there are fewer fullservice stations. We are thus compelled to agree with those who believe that ATV implementation will require that LPTVs and translators, as secondary services, yield to new full-power ATV stations.[109]

40. We thus conclude that we must continue LPTV and translators' secondary status vis-a-vis ATV stations. We do not agree with those who argue that this is impermissible and unfair because the low-power service was not established as secondary to ATV stations, but only to certain land mobile services and to the full-power television broadcast service in existence at the time the service was created.[110] Our rules proscribe interference to *"any* TV broadcast station" operating on the same or adjacent channel.[111] The low-power television service was established for the specific purpose of supplementing conventional broadcast station coverage and we have always considered low-power service stations secondary.[112] The low-power service thus has had ample notice that it would have to yield to any full-service stations, without exception for the specific mode in which the full-service station transmits.[113] We also do not believe that the displacement required under our rules is a restraint of trade or monopolistic, as Polar contends.[114]

41. We will not deviate from established precedent and afford a preference to translators over low power stations should displacement be required.[115] Our present rules balance the goals of maintaining translator service and encouraging new low power originating services.[116] We find that maintaining such a balance is in the public interest. Our present rules also make no distinctions among low-power service applicants based on the content of their programming.[117] We do not believe that this proceeding is the proper procedural context for development of a preference for foreign-language low power stations or that the record before us is sufficiently developed to permit adoption of such a rule, as some parties request.[118]

42. Based on Staff and Advisory Committee technical studies, we find that there is insufficient spectrum to permit LPTVs and translators to be included in the class of broadcasters initially eligible for an ATV frequency on either a primary or secondary basis or to factor in LPTV displacement considerations in making ATV assignments, as several parties argue.[119] Because LPTVs and translators are secondary to full-service stations, we do not believe it would be appropriate for us to require full service stations displacing low-power service stations to compensate them, as some suggest.[120] In addition, as stated above, with the proposed exception of those awarded NTSC authorizations in the interim period extending from adoption of the *Notice* to initial assignment, we will not grant priorities to any entity for eligibility for an ATV channel after initial assignments are made.

43. At the same time, we recognize that LPTVs and translators may have a role in implementing ATV. Some parties suggest that the nature of their operations may make the low-power television station transition to ATV more economical and expedient than that of full-service stations.[121] Moreover, given the absence of multiple ownership restrictions on low-power stations, they will be free to add a second low-power ATV channel, provided no unacceptable interference to full-service stations or other protected operations occurs. In addition, we will permit LPTV and translator stations to broadcast in either the ATV or NTSC mode once ATV implementation begins.

44. We propose to require low-power television service stations to broadcast in the ATV mode at the time that full-service stations will be required to convert to ATV and

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[108] *Notice*, 6 FCC Rcd at 7030; Joint Broadcaster Comments at 33. *Cf.* CBA Comments at 4.

[109] EIA/CEG Comments at iii, 8-9; ATSC Comments at 5; Golden Orange Comments at 2.

[110] Third Coast Comments at 3-4; Island Reply at 3. *See also* Polar Reply at 4-5.

[111] 47 C.F.R. § 74.703 (b) (emphasis supplied). *See also An Inquiry Into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System*, 51 RR 2d 476, 486, 488500 (1982) (*Low Power Service Order), recon. granted in part on other grounds*, 53 RR 2d 1267, *recon. denied*, 95 FCC 2d 657 (1983), *aff'd sub nom. Neighborhood TV Company, Inc. v. FCC*, 742 F.2d 629 (D.C. Cir. 1984).

[112] *Low Power Service Order, supra*, 51 RR 2d at 488.

[113] LPTVs and translators have been on notice since 1987 that ATV might increase demand for broadcast spectrum. In 1991, in order to minimize the potential disruption to the low-power service, we instituted a freeze on new low power station applications in major urban markets. Public Notice, *Notice of Limited Low Power Television/Television Translator Filing Window From April 29, 1991, Through May 3, 1991*, Mimeo No. 12124 (released Mar. 12, 1991).

[114] It is unclear what Polar means by "purposeful" displacement of low power stations. Polar Reply at 7.

[115] *Low Power Television and Translator Service*, 102 FCC 2d 295, 308 (1984); Joint Broadcasters Comments at 33-35; MST Reply Comments at 16-17.

[116] *Low Power Television and Translator Service*, 102 FCC 2d at 308.

[117] *See Low Power Television and Translator Service*, 2 FCC Rcd 1278, 1288 n.14 (1987) (*Displacement Order).*

[118] *See, e.g.*, Telemundo Comments at 11-12; Telemundo Reply Comments at 2. *Cf. Religious Broadcasting Network, supra*, 3 FCC Rcd at 4102 (1988) (describing showing required for addition of specialized and comparative programming issues in full-service comparative hearing context).

[119] 1988 OET Study, *supra;* 1989 OET Study, *supra*, Preliminary Analysis of VHF and UHF Spectrum Scenarios in Part III, Advisory Committee, Planning Subcommittee Working Party 3, Doc. 0174 (June 1991); Polar Comments at 2, 6-7; Polar Reply Comments at 6; Third Coast Comments at 4; Communicasting Comments at 2; Island Comments at 6; CBA Comments at 2. We also do not believe the suggestion that we displace permittees that have not yet built stations in order to accommodate the channel needs of displaced LPTV and translator licensees, in light of the spectrum needs of ATV, is likely to be of practical value. We thus decline to adopt it. CBA Comments at 1-2; 4; Polar Comments at 3; CBA Reply at 4; Telemundo Comments, Exhibit 1. In addition, we decline Third Coast's suggestion that we prohibit construction of authorized fullservice NTSC and low-power stations in major markets once ATV allotments are made in order possibly to provide channels for displaced LPTVs. Third Coast Comments at 4. This proposal would be unfair to those who may have invested in reliance on the expectation of being awarded a license once they had constructed, provided, in the case of LPTVs, they also caused no interference to full-service stations.

[120] Communicasting Comments at 2.

[121] Polar Comments at 6-7; Polar Reply at 6; St. Clair Reply Comments at 2-3.

cease broadcasting in NTSC.[122] Such a requirement would be consistent with our treatment of full-service stations, and would help spur ATV receiver penetration by increasing the sources of ATV programming available. Moreover, requiring low-power television service to implement ATV at the time of full service station conversion gives LPTVs and translators ample time to plan their transition. We seek comment on this proposal.

45. Recognizing the significant benefits that low power services bring to the public, we will, as CBA and others suggest,[123] take such steps to mitigate the likelihood and effects of displacement as are consistent with our other objectives in this proceeding. We thus will continue to permit a low power TV station displaced by a full-service station to apply for a suitable replacement channel in the same area without being subject to competing applications.[124] We will also continue our present policy of permitting low power service stations to operate until a displacing full-service ATV station is operational. As Telemundo suggests, we also will continue to allow displaced LPTVs to migrate to vacant NTSC channels, including vacant reserved noncommercial channels. We stress, however, as Public Television suggests, that LPTVs' use of such vacant spectrum is secondary only.[125] Moreover, as Telemundo suggests, we will continue to permit LPTVs and translators to file non-window displacement relief applications to change their operating parameters to cure interference to an ATV station.[126] We also tentatively agree with arguments that certain specific NTSC interference protection rules could be re-evaluated and may afford low-power service interests some measure of relief.[127] We plan to initiate a separate proceeding to consider such changes. We decline, however, suggestions that we place additional requirements on full-service stations in order to minimize the likelihood of interference and displacement to LPTVs and translators.[128] It is the responsibility of the low-power service, as a secondary service, to yield to full-service stations where a conflict arises.

C. Broadcast Auxiliary Service[129]

46. We appreciate the difficulties that broadcasters are likely to face in meeting their auxiliary service needs for both an ATV and an NTSC4, channel.[130] As the Advisory Committee observes, the broadcast auxiliary spectrum is already congested, most severely in major markets, where ATV implementation will first occur.[131] We have, however, taken pains to protect broadcast auxiliary spectrum allocations in the 1990-2110 MHz band, despite intense, competing need for additional spectrum by new services.[132] Moreover, there is no additional spectrum at hand for broadcast auxiliary purposes.[133] Additional capacity may have to be obtained by, for example, reconfiguring existing microwave links for greater efficiency, making greater use of the higher frequency bands, use of optical fiber and combined optical fiber-microwave links, and employment of digital compression techniques to allow carriage of multiple NTSC signals in a single channel. We also suggest that broadcasters may increase their use of any existing available UHF spectrum for fixed auxiliary broadcast use.

D. Other Spectrum Issues

47. In order to ensure an adequate number of ATV channels in large border areas, some commenters urge that we initiate and/or intensify coordination efforts with Canada and Mexico.[134] Both the Advisory Committee and the Commission staff have begun informal discussions with Canada and Mexico. We plan to intensify these efforts and encourage the Advisory Committee to do the same.

48. Some commenters urge us to terminate Gen. Docket No. 85-172, which proposed further sharing, or reallocation, of UHF channels in eight large urban areas to private land mobile service.[135] We suspended action in that docket following initiation of this proceeding, out of concern that we not adversely affect spectrum options for ATV.[136] Those urging termination argue that the continued existence of Docket No. 85-172 creates an aura of uncertainty regarding the Commission's commitment to ATV and, given the potentially tight spectrum conditions for ATV in certain markets, can serve no useful purpose.[137] However, we agree with LMCC that it is premature to terminate Gen. Docket 85-172 at this time,[138] particularly in advance of a final allotment plan confirming predictions about spectrum needs for ATV. We thus decline to terminate Gen. Docket No. 85-172.

49. We also find that requests for reallocation of assertedly lightly used land mobile channels for television broadcast use are beyond the scope of this proceeding. These requests are properly the subject of a separate peti-

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[122] *See infra* Section IV.A.

[123] CBA Comments at 1-2, 4; Island Comments at 6; Third Coast Comments at 4; St. Clair Comments at 3-4 & n.2.

[124] *Displacement Order, supra;* 47 C.F.R. § 73.3572 (a)(2).

[125] Public Television Reply Comments at 5-6 n.9.

[126] Telemundo Comments at 9-10; 47 C.F.R. § 73.3572 (a)(2).

[127] *See, e.g.,* Third Coast Comments at 4, 5-6; Island Reply at 4; Communicasting comments at 2; St. Clair Reply Comments at 2.

[128] Island Reply at 4; Third Coast Comments at 4; Communicasting Comments at 2; St. Clair Reply Comments at 2.

[129] Broadcast auxiliary spectrum is used generally by television stations to convey their signals on a point-to-point basis from fixed or mobile facilities. Stations use this spectrum for such purposes as studio-totransmitter links (STLs), and for *ad hoc* links between remote locations and the studio or transmitter.

[130] *See, e.g.,* MST Reply Comments at 17-18; PS/WP3 Fifth Interim Report at 5-9.

[131] PS/WP3 Fifth Interim Report at 7. *See also* MST Reply Comments at 17-18.

[132] *Notice of Proposed Rule Making, Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies,* 7 FCC Rcd 1542 (1992) (*Spectrum Redevelopment Notice).*

[133] Although PS/WP3 cites possible sources of spectrum that may become available in the future, it cites no currently available sources. PS/WP3 Fifth Interim Report. In a related matter, ATSC requests that we defer a decision until certain Advisory Committee studies are completed. ATSC Comments at 5-6. In light of our consideration of the PS/WP3 Fifth Interim Report, and our evaluation of spectrum availability, we do not believe that such a deferral is necessary.

[134] Joint Broadcasters Comments at 32-33; EIA/ATV Committee Reply Comments at 18.

[135] *Notice of Proposed Rule Making, Further Sharing of the UHF Television Band by Private Land Mobile Radio Services,* 101 FCC 2d 852 (1985), *Order,* 2 FCC Rcd 6441 (1987) (*Suspension Order). See, e.g.,* Joint Broadcasters Comments at 28, 36-38, introduction 5.

[136] *Suspension Order,* 2 FCC Rcd at 6442.

[137] MSTV Reply Comments at 19; Joint Broadcasters Comments at 36-37.

[138] LMCC Reply Comments at 1-6.

tion for rule making. Their consideration in the instant docket would lead to undue delay and complication of the numerous and significant issues directly raised by the advent of ATV.[139]

IV. CONVERSION TO ATV

A. Timetable for Conversion

50. Most, although not all, of those commenting on the issue agree in principle with the proposal in the *Notice* that we require broadcasters to "convert" entirely to ATV --*i.e.*, to surrender one 6 MHz reversion channel and broadcast only in ATV on the conversion channel once ATV becomes the prevalent medium.[140] Requiring the surrender of the NTSC reversion channel will promote the introduction of ATV and maximize ATV coverage areas.[141] Although, as Golden Orange states,[142] there is a benefit to affording the public a choice between ATV and NTSC programming during the transition years, suggesting that such a choice will remain permanently available would undoubtedly inhibit the growth of ATV. More significantly, there are likely to be competing uses for this spectrum which we will have to address.[143] Thus, contrary to requests that we defer addressing the issue of conversion,[144] we put broadcasters on notice that when ATV becomes the prevalent medium, they will be required to surrender their reversion channel and cease broadcasting in NTSC. By not requiring conversion until ATV achieves consumer acceptance, we allay FTC's uncertainty about whether ATV's costs will exceed its benefits to consumers.[145]

51. As proposed, we will cease issuing new NTSC licenses, including noncommercial NTSC licenses, once we have completed the initial assignment of ATV channels to existing NTSC licensees, *i.e.*, two years after an ATV standard or a final Table of ATV Allotments is effective, whichever is later.[146] From that point forward, in order to begin the transition to ATV, we will issue new television broadcast licenses for ATV transmission only. We do not agree with Public Television that by ceasing to issue noncommercial NTSC licenses, we are defeating the purpose of pairing, where feasible, ATV channels with vacant noncommercial allotments.[147] That pairing permits noncommercial applicants to continue applying for NTSC/ATV pairs until the point that initial ATV assignments are completed. Once that point is reached, noncommercial applicants will still be able to apply for the ATV channels that were set aside for the former NTSC noncommercial reserve.[148] In addition, should an existing broadcaster have forfeited its initial eligibility by, for example, failing to apply and construct within the required time, we will allow that broadcaster subsequently to apply, along with any other qualified parties, for any available ATV allotment or for an available ATV channel that will enable it to switch directly to an ATV channel at the time of conversion. If it is technically possible, a broadcaster may also use its existing NTSC frequency for this purpose. Finally, we will permit modifications to NTSC facilities after adoption of a final Table of Allotments for ATV channels provided they comply with technical criteria for the protection of ATV vacant allotments, applications and assignments.

52. We also conclude that we should set a firm date for conversion to ATV. We agree with Zenith that use of a firm date would keep administration simple, assure progress toward freeing spectrum on a timely basis and give broadcasters, consumers and manufacturers the benefits of a clearly defined planning horizon.[149] Our review of the record also persuades us that complete reliance on ATV receiver penetration rates as a triggering event for conversion, on either a nationwide or market-by-market basis, as the *Notice* also suggested, would not provide this same clear signal.[150]

53. We tentatively conclude that we should establish a date for conversion that is 15 years from the date adoption of an ATV system or a final Table of ATV Allotments is effective,[151] whichever is later.[152] This date should permit the majority of consumers who purchase NTSC receivers prior to the introduction of ATV to get full use of their

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[139] Joint Broadcasters Comments at 37-38; MST Reply Comments at 20-22. For the same procedural reasons, we decline St. Clair's requests to reallocate channel 37 (radio astronomy) for low power/translator and full service use or to reduce the land mobile reserve and use these channels for low power/translator services. St. Clair Comments at 3-4 & n.2.

[140] *Notice*, 6 FCC Rcd at 7031; Joint Broadcasters Comments at 24 & n.15; Fleet Call Reply Comments at 5-6; Schreiber Reply Comments at 3-4; ATSC Comments at 6; Zenith Comments at 5.

[141] Joint Broadcasters Comments at 24 & n.15.

[142] Golden Orange Comments at 10-11, 13; Golden Orange Reply Comments at 1-3. *See also* EIA/ATV Committee Reply Comments at 9; FTC Reply Comments at i, 2, 22-24, 27 (consumers may continue to find NTSC broadcasts warrant support even after their purchase of ATV receivers).

[143] *See generally Spectrum Redevelopment Notice, supra*. *See also* Schreiber Reply Comments at 3-4; Motorola Comments at 3-4; Phillips Reply Comments at 5; Telemundo Comments at 12. *Cf.* FTC Reply Comments at 24 (future termination of NTSC would encourage economic efficiency if there were other uses of spectrum of more value to consumers). We do not, however, here decide what the specific allocation of the surrendered spectrum should be, as some suggest. *Cf.* Public Television Comments at 11 (arguing that reallocated spectrum at time of ATV conversion should be used first to replace any noncommercial reserved channels that are deleted to accommodate ATV implementation). We believe that that it would be premature at this point to decide the specific future use for this reclaimed spectrum.

[144] Sarnoff Reply Comments at 2-3; Westinghouse Comments at 5.

[145] FTC Reply Comments at 22, n.43. FTC also observes that, for households purchasing an ATV receiver, continued NTSC broadcasts will permit continued use of the second or third NTSC receivers that these households might also have. FTC Reply Comments at 23.

[146] *Notice*, 6 FCC Rcd at 7031-32; Joint Broadcasters Comments at 24. As Joint Broadcasters suggest, we do not plan to lift the current freeze on NTSC applications in major markets. Joint Broadcasters Comments at 24.

[147] Public Television Comments at 23 n.19.

[148] Those ATV channels, together with any VHF channels that had previously been set aside for noncommercial use, *see* P.L. No. 101-515, *supra*, would then constitute the noncommercial reserve.

[149] Zenith Comments at 8-9.

[150] *Notice*, 6 FCC Rcd at 7032.

[151] As stated *supra*, Section II.F, we believe that it is essential that the principles governing allotment/assignment issues be resolved by the time an ATV standard is adopted.

[152] As a matter of chronology, we envision the five-year ap-

NTSC equipment.[153] Moreover, by this point, we expect that the cost of ATV receivers should have declined from the level of initial prices,[154] as a result of increased consumer acceptance and higher volume sales. Preliminary studies also suggest that, even absent imposition of a conversion deadline, significant numbers of consumers should have purchased ATV receivers by this point. Indeed, it is possible that alternative media such as VCRs and cable may seed the ATV receiver market even before ATV terrestrial broadcasts begin.[155] By the time our proposed conversion point is reached, broadcasters will have constructed an ATV transmission facility and should have implemented studio production capability.[156] It is also possible that inexpensive downconverters permitting the reception of ATV signals on conventional NTSC sets (in NTSC quality) will have become available, thereby enabling those without ATV television sets to continue to receive broadcast service without purchasing a completely new receiver.[157] We seek comment on our tentative conclusion that a 15-year conversion date would be appropriate and on the reasoning underpinning this tentative finding.[158]

54. We also invite interested parties, particularly system proponents, consumer electronics manufacturers, and professional broadcast equipment manufacturers, to comment on the availability and costs they project during this 15-year period for equipment needed in the home and in the broadcast studio to receive and produce programming in the ATV mode. In particular we seek comment on the timing of widespread availability of ATV receivers, home downconverters, and ATV professional broadcast equipment, and what the cost of such equipment is expected to be (including any expected changes in price) during the 15-year conversion period. We also ask parties to comment on whether the possible availability of downconverters should influence the manner by which we assess ATV acceptance. Would the availability of reasonably priced ATV downconverters lessen concerns about the premature obsolescence of NTSC sets in a household?[159]

55. Notwithstanding our tentative conclusion to set a 15-year conversion date, we acknowledge that, at this point, it is difficult to predict with certainty how ATV implementation will occur.[160] Various developments relevant to the new ATV technology and to a date for conversion conceivably may emerge in the next several years.[161] While we will establish a firm conversion date in the next

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plication/construction period beginning to run from the time a Report and Order adopting an ATV standard or a Final Table of ATV Allotments becomes effective, whichever is later. After an ATV standard/Table of Allotments is effective, we will begin to accept broadcaster applications for ATV construction permits; the precise point at which such applications may be accepted, however, may vary depending on the particular assignment methodology which is adopted. *See supra* Section II.F. We tentatively plan to impose a 100 percent simulcast requirement no more than four years after this five year period ends. We have similarly proposed to commence the running of a 15-year transition to complete ATV conversion at the time a final Table of ATV Allotments or an ATV standard is effective, whichever is later.

[153] *See, e.g.*, EIA/CEG Comments at 11; Philips Comments at 10-12 (average life of a television receiver is 15 years); EIA Color Television Replacement Cycle Study at iii (Apr. 1985) (it takes about 15 years for half of all television sets to go out of use).*Cf.* Zenith Comments at 8-9 (consumers expect to use new NTSC receivers for seven to 10 years). *See also* CDE Comments at 7, 9 (sufficient transition needed to avoid making current NTSC receivers prematurely obsolete).

[154] Zenith Comments at 7 (forecasting initial product acceptance in the giant screen segments of the industry, priced 50 to 100 percent above today's giant screen televisions); Philips Comments at 10-12 (ATV receivers will be "high end" products for a number of years after ATV broadcasting is initiated).

[155] For example, Working Party 5 of the Planning Subcommittee of the Advisory Committee (PS/WP5) as a preliminary matter projected 40 percent receiver penetration 10 years after one percent penetration is achieved, and PS/WP4 now believes this projection to be pessimistic. Fourth Interim Report of the Working Party 5 on Economic Factors and Market Penetration of the Planning Subcommittee of the Advisory Committee on Advanced Television Service (Mar. 4, 1992) at 7-8 (PS/WP5 Fourth Interim Report); PS/WP5 Fifth Interim Report at 4. Zenith states that one percent penetration could be reached as early as the second year after ATV receivers are introduced. Zenith Comments at 8. PS/WP5 states that the opportunity exists for alternative delivery media including cable, home video and satellite service to start the penetration of the consumer market with ATV service at the time, or shortly after, an ATV standard is established. PS/WP5 Fifth Interim Report at 6. IS/WP2 does not agree that ATV receiver penetration will be seeded by demand for receivers stimulated by other media, and projects consumer equipment availability two and a half to three years after Commission authorization of ATV broadcast service. Contribution to the Fifth Interim Report of the Implementation Subcommittee from Working Party 2 on Transition Scenarios (Jan. 31, 1992) (IS/WP2 Fifth Interim Report) at 12, *in* Implementation Fifth Interim Report, Attachment A. IS/WP2 is conducting further studies on consumer receiver development.

[156] *See supra* Section II.E; *CBS Study, supra* at 17 (study conducted prior to the "use or lose" condition placed on meeting ATV construction deadline, finds that last group of stations to build ATV facilities will begin in year 6 and complete studio implementation in nine years). We also believe that this schedule should permit stations to depreciate NTSC equipment on a reasonable timetable, as CDE suggests. CDE Comments at 5-7.

[157] *Compare* ATSC Comments at 6; Zenith Comments at 6 (envisioning availability of inexpensive downconverters)*with* Philips Comments at 13 n.11 (although reasonably priced ATV downconverters are a possibility, it is too soon to predict their availability or cost, or what consumer reaction to them would be).

"Upconversion" refers to programming converted from NTSC to ATV format. "Downconversion" refers to conversion from ATV to NTSC.

[158] Adherence to a timetable for the conversion to ATV is also desirable because of the spectrum's potential to support new applications and services. If the value of the spectrum for those uses could be quantified, it might be expressed in terms of rents or fees for occupancy of additional ATV spectrum. The Commission, of course, does not plan to condition the use of conversion or reversion channels on any such payment. We underscore, however, that the spectrum to be used for the transition to ATV has significant value for other services and benefits and that any delay in reclaiming the reversion spectrum carries potential costs to the public.

[159] *See, e.g.*, Weiss Comments at 9; EIA/ATV Committee Reply Comments at 9.

[160] *See generally* Joint Broadcaster Comments at 25-26; EIA/CEG Comments at 9-10; Philips Comments ii, 14; Fleet Call Reply Comments at 5-6.

[161] *See generally* EIA/CEG Comments at 10.

stage of this proceeding, we propose to review, in 1998, the propriety of that conversion date. This review should alleviate concerns about premature termination of NTSC.[162] It would also leave room for adjustment if ATV implementation should proceed more or less swiftly than we envision. We note that by 1998, we should have gained considerable experience concerning the transition to ATV: we will have selected an ATV system and established an ATV standard; ATV receivers should be available; and numerous broadcast stations should be transmitting in ATV.[163] By 1998, we also should have better data regarding the development of set-top converters and other factors relevant to determination of a timetable for recapture of NTSC reversion spectrum. This data will in turn enable us to weigh the opportunity costs of keeping the reversion spectrum with broadcasters for some additional period of time against the costs to broadcasters and consumers of fully converting to ATV. We seek comment on our proposal to review, in 1998, the suitability of the conversion date we will soon establish in the next stage of this proceeding.

B. Switching Frequencies

56. We agree with Joint Broadcasters that we cannot permit stations to switch their NTSC and ATV channels on an individual, voluntary basis.[164] As we stated in the *Notice*, it is likely that ATV-NTSC co-channel spacing will be shorter than ATV-ATV and NTSC-NTSC co-channel spacing. Unless all stations with co-channel facilities at less than the minimum ATV-ATV spacing in a given area switch together, switching ATV and NTSC frequencies may result in ATV stations with service areas permanently much smaller than would have been the case if switching had not been permitted.[165] Accordingly, we will permit switching of ATV and NTSC frequencies only on a case-by-case basis, after careful coordination insuring that other ATV service areas are not adversely affected and no other negative interference consequences result, and assuming that such switching harmonizes with any long-range plan for use of television spectrum that we develop.

57. Commenters generally oppose the suggestion that we should require all broadcasters to switch back to their original (formerly NTSC) frequencies at some future point.[166] Some argue that it would require significant additional investment[167] and lead to consumer confusion.[168] Other parties, however, advocate requiring broadcasters to switch to new channels so that all ATV operations can be reaccommodated in the most spectrally efficient manner. These parties advocate establishment of a contiguous UHF allocation.[169] We agree, however, with those parties who counsel that we cannot know the relative value of ATV broadcasts in the VHF band as opposed to the UHF band until after we develop practical experience with this new technology.[170] As ATSC states, some predict that digital transmission will virtually eliminate the advantages of VHF over UHF. In such case, we might want to avoid the added expense to broadcasters that a switch to VHF would cause, and to consider other uses for that spectrum.[171] We will thus wait until ATV implementation is underway and we have practical experience on which to base our judgments, to decide whether, at some future point, we should require or permit broadcasters to switch frequencies.

V. SIMULCASTING

58. The *Notice* stated our belief that ATV implementation should be structured to protect the existing investment in consumer equipment so that consumers are not prematurely forced to purchase new receivers to enjoy top quality over-the-air television programming. We stated that a simulcast requirement (under which at least some amount of programming would have to be broadcast simultaneously over both the NTSC and ATV channels) would be one means of achieving this goal. We thus sought comment on the degree of simulcasting, if any, we should require and on whether there were any other equally effective ways to protect investment in NTSC equipment.[172] After reviewing the comments on this issue, we conclude that we should require 100 percent simulcasting of the programming on the ATV channel at the earliest appropriate point. For the reasons given below, we tentatively conclude that this 100 percent requirement should be adopted no later than four years after the ATV application/construction period for preferred allotments has passed, and we seek comment on whether we should permit broadcasters some initial flexibility prior to this point.

59. A simulcast requirement will help ensure that consumers are not prematurely deprived of the benefits of their existing television receivers and other devices. In addition, we underscore that ATV is not a separate television service and will not result in the permanent grant of two 6 MHz channels to existing broadcasters. We intend to

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[162] *See, e.g.*, Joint Broadcaster Comments at introduction 3, Zenith Comments at 8-9; EIA/CEG Comments at 9-10; MST Reply Comments at summary 12, 6-7.

[163] Fifth Interim Report at 16 (Advisory Committee Final Report expected February 1993); IS/WP2 Fifth Interim Report at 12 (general market availability of ATV receivers projected two and a half to three years after order selecting system); PS/WP5 Fifth Interim Report at 6 (there is some doubt that cable systems would introduce ATV service before local broadcast ATV service is in operation; however, a limited inauguration of ATV cable service is planned for 1992); *see* discussion *supra* Section II. E on application and construction periods.

[164] Joint Broadcasters Comments at 26-27 & n.18.

[165] *Notice*, 6 FCC Rcd at 7033. *See also* Zenith Comments at 10-11.

[166] Joint Broadcasters Comments at 27; Zenith Comments at 10; Golden Orange Comments at 6; Brandenton Comments at 4. *See also* Lippman Comments at 4 (opposing switching if NTSC channels are VHF).

[167] Joint Broadcasters Comments at 27; Zenith Comments at 10-12 (observing that after NTSC ceases, broadcasters will be able to operate ATV in a much more efficient manner).

[168] Zenith Comments at 11.

[169] Lippman Comments at 4; Golden Orange Comments at 5-6 & n.4, 7 & n.5, 9. Golden Orange favors a single contiguous UHF ATV band allocation and a second band for stations that it argues should be permitted to choose to continue in NTSC. Joint Broadcasters argue that Golden Orange's proposed means of reconfiguring the UHF and VHF bands is not technically feasible. Joint Broadcaster Comments at 27.

[170] Westinghouse Comments at 5; ATSC Comments at 7. *See also* Philips Comments at iii (opposing both surrender of NTSC channels and repacking).

[171] ATSC Comments at 7.

[172] *Notice*, 6 FCC Rcd at 7033.

reclaim the reversion channel as soon as possible. Requiring simulcasting will help us to do so by minimizing broadcaster and consumer reliance on the ATV channel as a separately programmed service. Thus, we firmly disagree with Golden Orange that we should continue to permit NTSC stations to continue indefinitely and with different programming.[173] In addition, a simulcast requirement will give added impetus to ATV receiver penetration by eliminating the need for dualmode receivers capable of receiving both NTSC and ATV. It will thereby help lower the cost of ATV receivers, which in turn should spur increased penetration. Thus, simulcasting will not only protect existing consumer investment in NTSC equipment, but also facilitate consumer purchase of new ATV receivers. Our ultimate goal, therefore, is to require simulcasting of 100 percent of the programming on the ATV conversion channel as soon as is appropriate.

60. In this regard, we tentatively conclude that we should impose a 100 percent simulcasting requirement no later than fours years after the five-year ATV application/construction period for preferred allotments has passed.[174] At this point -- nine years after a standard becomes effective -- we will have afforded broadcasters sufficient time in which to explore the potential of this new technology, and ATV should have established itself.[175] Thus, the need to afford broadcasters some flexibility in starting up ATV operations will have diminished. On the other hand, ATV receiver penetration, and hence revenues from ATV programming, should be increasing. With the ascendance of the ATV channel, the need to protect consumer investment in existing NTSC equipment will increase. As the ATV channel begins to produce its own revenues, the need to insure the surrender of the reversion channel also will increase. Requiring 100 percent simulcasting at this point will serve our twin goals of protecting consumer investment in NTSC equipment and insuring spectrum efficiency. We accordingly seek comment on our plan to require 100 pecent simulcasting no later than four years after the initial five-year application/construction period has passed.

61. At the same time, we recognize that there may be a need for some initial flexibility in programming the ATV channel to permit the development of equipment and programming for this new technology and to attract consumer interest. In the early stages of ATV implementation, it is unclear whether all stations could or will initially have the program sources or technical capability to simulcast all their programming.[176] In addition, some parties suggest that the quantity and/or quality of ATV programming is likely to be a driving force in consumer acceptance of this new transmission mode.[177] Moreover, broadcasters are likely to need some freedom to explore the dimensions of the new ATV technology, to use it creatively and to realize its full potential.[178] In order to develop and produce the programming that will best exploit the benefits of ATV and attract consumers to this new technology, broadcasters may need some initial reprieve from a full simulcasting requirement. Moreover, regulation to protect consumer investment in existing NTSC equipment may well be unnecessary in the early stages of ATV implementation. In these early stages, stations will have every incentive to maintain their NTSC programming,[179] and ATV receiver penetration (and consequently viewership and advertising revenues) will be relatively low.[180] Thus, broadcasters will surely retain a substantial financial incentive to maintain the quality of their relatively more lucrative NTSC programs.

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[173] Golden Orange Comments at 12-13; Golden Orange Reply Comments at 5. *See supra* Section I.A.

[174] The simulcast requirement would begin to run on a nationwide basis. We would not make exceptions to the simulcast requirement for individual stations that obtain extensions of their construction permits. We believe that piecemeal implementation would, to the detriment of the viewing public, prove too disruptive to programming sources that are supplied nationwide.

[175] *See generally CBS Study, supra,* at Table 11 (in year six -- five years after first stations begin construction, 100 percent of TV households should be able to receive ATV service from stations in their market); *see also* PS/WP5 Fifth Interim Report, *supra,* at 6-7 (opportunity exists for alternative delivery media, *i.e.,* cable, home video and satellite service, to start the penetration of the consumer market with ATV service at the time, or shortly after, FCC establishes an ATV standard); *see also* discussion *supra* note 155 (discussing preliminary projections of ATV receiver penetration).

[176] If, for example, most stations receive their ATV programming from a separate, second program feed (be it network or some other program source), they may not have the capability at the outset to upconvert their non-network programming from NTSC to ATV. In addition, stations may need several years to implement full ATV production capability in their studios. CBS Study, *supra* at 6-7, 17 & Figure 12 (last group of stations to implement ATV taking nine years to implement ATV studio production capability). Manufacturers also may need some time to develop such equipment and to produce adequate supplies for all stations.

[177] Westinghouse Comments at 5; EIA/CEG Comments at iii-iv, 5, 12; ATSC Comments at 6; EIA/ATV Committee Reply Comments at 11-12.

[178] *See generally* FTC Comments at i, 25-26, 28; Public Television Comments at v-vi, 21, 29-30. *Cf.* ATSC Comments at 8. Public Television suggests that certain types of programs, *e.g.,* a program focusing on Albrecht Durer's etchings, would be particularly effective on ATV, with the higher resolution images it affords. Public Television also suggests that ATV offers a range of programming options not possible with NTSC format, by *e.g.,* reducing the need for close-ups, and, through its wider aspect ratio, permitting scenes with expansive backdrops. Public Television Comments at 2930. The early stages of ATV, when there are relatively low audience numbers for the ATV channel, might prove a suitable time for broadcasters to experiment and develop a facility with the new features of ATV technology without jeopardizing NTSC programming serving relatively large audiences. It is also possible that the production skills and program selection most appropriate for ATV may not always transfer well to the NTSC mode. Permitting broadcasters some initial freedom from simulcasting would enable them to gain some experience with the differences between ATV and NTSC and, subsequently, to produce simulcast programs that well serve viewers of both modes.

[179] Joint Broadcasters Comments at 29; Public Television Comments at v-vi, 29-30; ATSC Comments at 8; EIA/CEG Comments at iii-iv, 12; EIA/ATV Reply Comments at 11.

[180] Joint Broadcasters Comments at 29; EIA/CEG Comments at iii-iv, 12; FTC Reply Comments at i, 25-26, 28. At this point, much of the programming on the ATV channel may well be converted NTSC programming. Weiss Comments at 10; Westinghouse Comments at 6 (traditional programming (such as news) may not be immediately available in ATV format).

62. We therefore seek comment on one alternative that would have us phase in our simulcasting requirement, permitting broadcasters to make adjustments in a gradual fashion. Under this staggered approach, we would allow broadcasters complete flexibility in programming the ATV channel during the first two years after the initial five-year application/construction period has passed. However, as ATV implementation progresses, ATV receiver penetration is likely to increase and the need for regulatory intervention to protect existing consumer investment and ensure our ability to reclaim the second 6 MHz channel becomes more acute. Thus, starting two years after the initial ATV application/construction deadline for existing broadcasters has passed[181] -- seven years from the time a Report and Order adopting an ATV standard becomes effective -- we would require broadcasters to simulcast 50 percent of each day's programming. This 50 percent requirement would continue to afford broadcasters some flexibility as they implement full ATV production capabilities, but would also prompt them to prepare for complete conversion to ATV technology by ensuring that they do not use the second 6 MHz channel to develop a separate program service. In addition, the phased-in 50 percent simulcast requirement would enable us to safeguard consumer interests in the long-term, when ATV overtakes NTSC, by protecting the public's investment in NTSC technology. For the reasons discussed above, the 50 percent simulcasting requirement then would be increased to a 100 percent requirement two years later, at a point nine years after an ATV standard becomes effective. We seek comment on this proposed approach.

63. We also seek comment on other alternative schedules, including an approach that would adopt a full simulcasting requirement earlier than four years after the application/construction period has passed. An earlier adoption of a 100 percent simulcast requirement would appear to strengthen our ability to reclaim one 6 MHz channel at conversion. If the necessary production and conversion equipment is available two years after the initial five-year application/construction ends, or even earlier, it might be technically feasible to move to a 100 percent simulcast requirement at such point. We seek comment on such an approach and the projections as to the availability of necessary hardware and software that underlie it. We also ask interested parties to comment on whether broadcasters would, regardless of technical feasibility, need some reprieve from a 100 percent simulcast requirement after the initial application/construction period passes to explore the creative potential of the ATV mode, to attract viewers to ATV, and to insure their ability to recoup their investment in ATV implementation.

64. We also seek comment on other proposed approaches to affording broadcasters flexibility in developing ATV technology. For example, we might require a broadcaster to air the same programming on the ATV and NTSC channels, but permit flexibility with respect to time of airing or material included. The guiding policy under such an approach would be to ensure that the NTSC viewer had an opportunity to receive the same programming available to ATV viewers during the early phase of ATV implementation. Under this approach, we would broadly define the "same time" at which simulcast programs are required to air, *e.g.*, as the same 24-hour period. As Joint Broadcasters suggest, we would define "same program" as one which has as its basis the same underlying material.[182] Thus, variances between programs accommodating the special nature of ATV or NTSC, such as different aspect ratios, angles or numbers of cameras, or commentary[183] would be permitted. We might also define "program" to exclude commercials and promotions[184] and to include primary material such as movies, news, sports, and entertainment shows. We also seek comment on whether programming subject to a simulcast requirement should be of some minimal length and, if so, what an appropriate length would be. For example, would it be appropriate to apply a simulcast requirement to programs of five minutes or more in length? Should the obligation be even broader, encompassing one-minute news breaks for example, or narrower, applying to programs perhaps of 15 minutes or more in duration? These proposed definitions regarding the timing and content of simulcast material would give broadcasters added flexibility and would alleviate concerns that a simulcasting requirement will have a chilling effect on program content or raise First Amendment concerns.[185] We seek comment on these proposals. If we do adopt such an approach, we seek comment on whether it would remain necessary to "phase in" a full simulcasting requirement, as proposed above, to afford broadcasters the flexibility they may need to implement ATV.

65. As CapCities suggests, we also tentatively conclude that, from the outset, upconverted NTSC programming on broadcasters' second 6 MHz channel must be simulcast programming.[186] We are awarding broadcasters a second 6 MHz channel on an interim basis to permit them to make a transition to ATV. We see no reason to permit use of the second channel for non-ATV programs that differ from those broadcast on the associated NTSC channel. Thus, in the event we adopt a phased-in simulcast requirement, we would nonetheless expect programming on the ATV channel to take full advantage of the technical capabilities of the ATV mode. We seek comment on these tentative conclusions. We also seek comment on the types of programming which would take such full advantage of the ATV mode. For example, such programming might include: (1) programs produced in film and directly converted to the ATV mode; (2) programs originally produced on tape in the ATV mode; and (3) programs produced in the ATV mode live. We ask interested parties to comment on what other types of programs, in addition to these three categories, would take full advantage of the technical capability of the ATV mode.

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[181] *See generally* ATSC Comments at 8 (as time progresses and more consumers purchase new equipment, broadcasters may air alternative programming to provide consumers greater benefit from their purchase, and at this stage, the Commission will need to protect the viewer who has not yet purchased ATV equipment).

[182] Joint Broadcasters Comments at introduction 3-4, 28, 30.

[183] Different commentary might be appropriate where different camera angles are used in the NTSC and ATV versions of the same event, *e.g.*, an athletic competition.

[184] ATSC Comments at 8; Joint Broadcasters Comments at introduction 34, 28, 30.

[185] Public Television Comments at v-vi, 29-10; ATSC Comments at 8.

[186] CapCities Comments at 4-5.

66. As we assess the impact of the various alternatives for adopting a simulcast requirement, we are particularly interested in their effect on consumer interest in ATV and on ATV receiver penetration. The more swiftly ATV receiver penetration increases, the more rapidly we will be able to reclaim one 6 MHz channel. We thus are most concerned that we receive detailed comments from electronics manufacturers on the desirability of any given simulcast approach. In addition, we seek detailed comment, especially from professional equipment manufacturers, regarding the speed with which cost-effective equipment permitting upconversion of NTSC programming and downconversion of ATV programming will be available. We also ask for detailed information, particularly from consumer equipment manufacturers, regarding the extent to which inexpensive downconverters for home use are expected to be readily available. We ask interested parties, particular consumer equipment manufacturers, to comment on the likelihood that dual mode ATV/NTSC receivers will be developed, and the relative cost of such a dual mode receiver as compared with an ATV-only receiver. Finally, we ask interested parties, particularly the programming community, to comment on whether and when a supply of ATV-capable programming is expected to be readily available to broadcasters and consumers.[187]

67. In a related matter, CapCities requests suspension or waiver of Commission rules governing the network/affiliate relationship and contractual negotiations to permit a network to link affiliate clearance or preemption of a program in one format (NTSC or ATV) to clearance or preemption in the other format.[188] These particular rules are at issue in a pending Commission proceeding addressing the need to reform our existing broadcast rules.[189] We will therefore not consider relaxation of these rules in this docket at this time. After a decision has been reached in the *TV Marketplace* proceeding, we will consider in this rule making any specific ATV-related questions that remain, if necessary.

VI. PATENT LICENSING AND RELATED ISSUES

68. The *Notice* stated our belief that, in order to generate the volume of equipment necessary for ATV service to develop widely, the patents on any winning ATV system would have to be licensed to other manufacturing companies on reasonable terms.[190] The consensus among the commenters is that the winning proponent should adopt such reasonable patent licensing policies.[191] There is, however, some divergence of opinion as to the degree to which regulation is required, either now or at some future point, to ensure that reasonable patent licensing policies are indeed adopted. The ATV testing procedures already require proponents to submit, prior to testing, a statement that any relevant patents they own would be made available either free of charge or on reasonable, nondiscriminatory terms.[192] Contrary to the views of those advocating greater regulatory involvement,[193] we find that these requirements adequately safeguard the consumer and competitive interests in reasonable availability of relevant patents, so far as is currently possible.

69. One party suggests that there will be powerful marketplace incentives which will induce a winning proponent to adopt reasonable patent procedures.[194] Although this may well prove true, this issue is critical to ATV implementation and to the consumer and competitive interests implicated. When we officially select an ATV system, therefore, we will condition that selection on the proponent's commitment to reasonable and nondiscriminatory licensing of relevant patents. Nonetheless, we find it premature to decide now, as some commenters advocate, whether we can or should exercise greater regulatory control over a selected system's patent practices.[195] Finally, we recognize that prompt disclosure of a winning system's technical specifications may be necessary to permit the mass production of ATV equipment in a timely fashion. The Advisory Committee indicates that industry efforts are underway to designate a standards-

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[187] *See supra* note 176 and associated text.

[188] CapCities Comments at 2-3.47 C.F.R. §§ 73.658 (a), (d), (e).

[189] *Notice of Inquiry, Review of the Policy Implications of the Changing Video Marketplace,* 6 FCC Rcd 4961 (1991).

[190] The technology, intellectual property, communications and competition policy questions generated by patent licensing and related issues in the context of selection of an ATV standard have been brought to the attention of other expert agencies, including the Department of Justice, and the Department of Commerce. Letter to Thomas J. Sugrue, Esq., Acting Assistant Secretary for Communications and Information, United States Department of Commerce, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992); Letter to Nancy H. Mason, Deputy Undersecretary, Technology Administration, United States Department of Commerce, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992); Letter to Constance L. Robinson, Esq., Chief Communications and Finance Section, Antitrust Division, United States Department of Justice, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (dated Feb. 11, 1992).

[191] EIA/CEG Comments at iv; Blonder Comments at 2; FIT Comments at i, 5; Philips Comments at iv.

[192] The Advisory Committee ATV Test Procedures Test Management Plan at § 2.1 requires that proponents follow American National Standards Institute (ANSI) patent policies in certifying to the availability of relevant patents they hold. ANSI requires assurance that:

> (1) A license will be made available without compensation to applicants desiring to utilize the license for the purpose of implementing the standard or
>
> (2) A license will be made available to applicants under reasonable terms and conditions that are demonstrably free of any unfair discrimination.

ATV Test Procedures Test Management Plan, Appendix A, § D.2 (Sept. 25, 1990, Rev.) .

[193] Blonder Comments at 2; FIT Comments at 5-6.

[194] EIA/CEG Comments at 13-14.

[195] *Compare* Blonder Comments at 2 and FIT Comments at 5-6 (supporting Commission involvement in patent issues)*with* Philips Comments at 15 (raising the question of the Commission's authority to address complex patent issues). *See also* Zenith Comments at 15 (alternatively advocating regulation of patent licensing that would favor firms using domestically-made ATV components). *Cf.* Blonder Comments at 3 (advocating definition of "American manufactured" for purposes of determining import duties on ATV products only if United States content is over 75%).

Some parties suggest that third party patent rights may complicate patent licensing issues. Although we decline to address the question in the absence of a particular factual context, we

setting group to undertake the formulation of such specifications.[196] We encourage such efforts and will monitor the progress of this industry activity.

VII. OTHER ISSUES

A. Compatibility

70. The *Notice* asked to what extent we could or should encourage compatibility of a terrestrial broadcast ATV system with other media, including other video delivery media, and with computer applications and other forms of data transmission.[197] The consensus among commenting parties generally favors such compatibility.[198] Despite the conceptual consensus on the value of compatibility, however, some parties caution that we should not permit compatibility concerns to drive our ATV policies to the detriment of other equally important values.[199]

71. Parties disagree on the need for us to take additional regulatory action to promote compatibility at this time. We recognize, as do the vast majority of commenters, the importance to any ATV system we adopt of compatibility with other transmission forms and media applications. The Advisory Committee and other bodies, including the EIA, SMPTE, and ATSC, are presently addressing these issues.[200] PS/WP4 plans to initiate a case-by-case analysis of each proponent system's suitability "for cost-effective, optimum quality interoperation with alternative delivery media and applications, including analysis of economic and social impacts."[201] This plan appears as adequate an answer to Liebhold's request for a case-by-case evaluation of ATV systems as is possible at this stage.[202] PS/WP4 has also recommended the adoption of headers and descriptors.[203] It is monitoring the work of SMPTE, which has recently completed a feasibility study on ways to implement this concept, and plans further studies in this area.[204] These efforts appear to respond as adequately as is feasible at this procedural juncture to Gerovac's advocacy of a universal self-identifying header mechanism to be incorporated into an ATV standard.[205] Moreover, the Advisory Committee selection process already takes compatibility concerns into account. Interoperability and extensibility are among the ten selection criteria the Advisory Committee will employ.[206] We encourage the ongoing work of the Advisory Committee, EIA, SMPTE and ATSC on compatibility

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observe that to the extent a winning proponent has obtained sub-licensing rights from a third party, we would expect such sub-licensing also to occur on reasonable, nondiscriminatory terms. *See generally* EIA/CEG Comments at 13; EIA/ATV Committee Reply Comments at 12; Philips Comments at 14,15.

196 Fifth Interim Report at 21.

197 *Notice*, 6 FCC Rcd at 7034.

198 *See, e.g.*, ATSC Comments at 9-10; Tennenhouse Comments at 1-2. One party believes that compatibility is necessitated by the breakdown in traditional boundaries between industries such as broadcast, telephone, cable and entertainment. Phillips Comments at 2. Others believe it will further First Amendment interests. *See, e.g.*, Donahue Comments at 1-3. CTW believes it will enable consumers to take advantage of developments allowing access to multiple sources of information simultaneously. *See* CTW Comments at 3-4. IAF believes that compatibility will permit interactive applications for education, health and other social information needs. *See* IAF Comments at cover page, 2. Some argue that alternative media are growing increasingly important (*see* EIA/ATV Committee Reply Comments at 13-14) and that compatibility will avoid consumer frustration over multiple, incompatible standards for cable, satellite and VCRs (*see e.g.*, EIA/CEG Comments at iv, 1415). Some parties argue that compatibility will help spur economic competitiveness (*see* Donahue Comments at 1-3) and industrial growth (*see* McKnight/Solomon Reply Comments at 3-5). Some state that compatibility with other media will lead to increased penetration levels by helping to justify the initial investment in ATV receivers. *See, e.g.*, CTW Comments at 3-4. Some view compatibility as extending across different applications and industries. *See, e.g.*, Comsat Comments at 1-3. Some see it extending over time, preventing obsolescence. *See, e.g.*, Khosla Comments at 1-3; Liberty Comments at 3.

199 *See, e.g.*, Schreiber Further Reply Comments at 3. Some cite the need for speedy implementation of ATV as a competing value. Zenith Comments at 1617; ATSC Comments at 9. *But cf.* Gerovac Comments at 2 (opposing the view that addressing compatibility issues now will cause needless delay in initiation of ATV). Some also cite the "primary consumer interest" in new technology for television, *see, e.g.* ATSC Comments at 7, or the cost, quality or coverage of an ATV system, *see, e.g.*, EIA/ATV Committee Reply Comments at 14, as competing concerns.

200 Fifth Interim Report at 4-5; Advisory Committee on Advanced Television Planning Subcommittee Working Party 4 Interim Report (Dec. 31, 1991) (PS/WP4 Interim Report) *in* Fifth Interim Report, Appendix G; EIA/CEG Comments at 14-15; "SMPTE Approves Task Force Report on Headers/Descriptors," Society of Motion Picture and Television Engineers, Press Release (dated Feb. 7, 1992) (describing report of Task Force on Headers/Descriptors and noting ongoing work of task force on Digital Image Architecture) (SMPTE Press Release); ATSC Comments at 9, Annex 1 (Status Report of ATSC Specialist Group on Interoperability and Consumer Product Interface (T3/S2)(T3/S2 Report) dealing with a wide-range of alternative media issues including cable television, audio, set-top converters, direct broadcast satellites, prerecorded media, fiber optic delivery of ATV and microwave media).

201 PS/WP4 Interim Report at 7.

202 Liebhold Comments at 1.

203 A header is a sort of digital label which identifies the type of data (*e.g.*, still image, audio, type of auxiliary information) and type of processing performed on the data (*e.g.*, video format compression, conditional access technique if any) which the signal is transmitting. A descriptor details the technical characteristics of the data (and any processing done thereon) being sent. *See generally* PS/WP4 Interim Report at Table 2, Attachment A, at 6; SMPTE Press Release, *supra*. Headers and descriptors may be useful in achieving compatibility by permitting different amounts and kinds of data to be used by different applications and media.

204 Report of the SMPTE Task Force on Headers/Descriptors (Jan. 3, 1992).

205 Gerovac Comments at 1-2. *Cf.* Lippman Comments at 4-6 (call for meta standard usable across technologies for interpreting algorithm specifics).

206 These terms are further discussed *infra* note 207. The other eight criteria are (1) coverage area compared to NTSC, (2) percentage of TV licensees that can be accommodated, (3) transmission robustness, (4) audio/video quality, (5) cost to consumers, (6) cost to broadcasters, (7) cost to alternative media, and (8) scope of services and features. Letter from Robert Hopkins, Chairman of Advisory Committee Systems Subcommittee Working Party 4 (SS/WP4), to Richard E. Wiley, Chairman of the Advisory Committee on Advanced Television Service (dated Nov. 5, 1991). *See also* Minutes of Twelfth Meeting of SS/WP4 (Aug. 29, 1991) ("There is no consensus in the working party to apply weighting in selecting a proponent system").

issues. These industry efforts are critical to solving and achieving consensus on the numerous and complicated questions arising from our goal of approaching compatibility across media and over time. We do not believe it is necessary or would be productive at this stage in the progress of such activities for us to intervene, as some suggest.[207]

72. Most, although not all, parties commenting on the issue, perceive use of a digital format for ATV transmission as key to solving compatibility concerns.[208] DemoGraFX believes that system testing should be updated to test for varieties of digital imaging not originally anticipated, and that frame rates more compatible with 24 frames per second film should be considered.[209] Schreiber advocates the use of digital source coding and hybrid channel coding, believing that interoperability can be achieved by using signal representation in frequency space together with the ability to add or delete frequency components easily.[210] Sarnoff advocates an ATV system that uses a single video compression standard for all consumer and computer delivery media, arguing that this would be cost effective and would eliminate the need for multiple decoder types.[211] To foster compatibility with other video media, some parties advocate use of a common baseband video signal format.[212] Schreiber would mandate compatibility, requesting that we reconsider our tentative decision not to set standards for alternative media at this time.[213]

73. We agree with those commenters who recognize that for ATV to succeed, broad complementary ATV applications with other video media must exist.[214] We do not, however, believe it is appropriate at this stage of the Advisory Committee's ongoing work,[215] and with systems still being tested and developed, to consider these issues. To the extent parties may be advocating our consideration of a system different from any of those on the current test schedule,[216] they should respond specifically to our request for comment on the Advisory Committee's report on new developments.[217]

B. Alternative Media

74. NCTA raises concerns regarding effective transmission of ATV over cable.[218] We agree with NCTA that cable delivery of a quality ATV signal is critical to public acceptance of ATV.[219] We also agree with EIA/ATV Committee that, as a practical matter, any ATV system selected must support ATV carriage over cable systems.[220] Through its sponsorship of Cable Television Laboratories, Inc. (CableLabs), the cable industry has taken steps to ensure that the selected broadcast transmission system is compatible with effective cable carriage of the ATV signal.[221]

75. NCTA and ATSC both contend that the ability of proponent ATV systems to encrypt (scramble) cable pro-

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[207] *See, e.g.*, Schreiber Comments at 2-6. The *Notice* also sought comment on the desirability and importance to compatibility of an ATV system's possessing the qualities of interoperability, extensibility, scalability and harmonization. *Notice*, 6 FCC Rcd at 7034. The Committee for Open High Resolution Systems (COHRS), an informal ad-hoc group with members from the computer and telecommunications industries, government, and academia originated and advocated these terms. Most parties commenting on these qualities favor some or all of them. *See, e.g.*, Brady Comments at 2; AT&T Comments at 6-7; Sarnoff Reply Comments at 2; Philips Comments at iv, 18; Liebhold Comments, Attachment; DemoGraFX Comments at 1; Staelin Comments at 13. McKnight/Solomon Reply Comments at 5. Many parties suggest definitions for, or characteristics that would be associated with these terms. The Advisory Committee has also been working in parallel on these definitions. It defines interoperability as "the capability of providing useful and costeffective interchange of electronic image, audio and associated data: among different signal formats, among different transmission media, among different applications, among different industries, among different performance levels;" extensibility as "a property of a system, format or standards that allows future improvements in performance or format within a common framework, while retaining partial or complete compatibility among systems that belong to the common framework;" scalability as "the degree video and image formats can be combined in systematic proportions for distribution over communications channels for varying capacities;" and harmonization as "the coordination of different advanced image standards in an orderly process." PS/WP4 Interim Report, Definitions. Again, we do not believe it is appropriate to endorse specific definitions for, or aspects of, these attributes before the Advisory Committee completes the various tasks it has scheduled, and finalizes its recommendations, on this subject.

[208] *Compare* Phillips Comments at 3-4; Staelin Comments at 1-2; Khosla Comments at 3; Lippman Comments at 1-3; DemoGraFX Comments at 1-5; CTW Comments at 1-2, 4; AT&T Comments at 6-7; GI Comments at 2, 6; Westinghouse Comments at 9; McAdams Comments at 1 (all favoring digital format) *with* Schreiber Comments at 2, 5-6, Appendix; Schreiber Further Reply Comments at 23; Schreiber Reply Comments at 3 (favoring alternative). However, some parties dispute the advisability of using digital channels for non-television purposes. *Compare* Lippman Comments at 1 (advocating scalable digital transmission that is suitable for television or non-television services) *with* AT&T Reply Comments at 6-7 (general purpose digital channels would cause additional fragmentation in television markets and disrupt television service if ATV channels are devoted to non-television uses) *and with* Zenith Reply Comments at 3 (concepts such as universal digital channels independent of line counts and frame rates serve only to derail progress in bringing world-leading ATV technology to American consumers and broadcasters).

[209] DemoGraFX Comments at 1-5.

[210] Schreiber Comments, Appendix at 12. Responding to AT&T, *see* AT&T Reply Comments at 4, Schreiber states that he does not advocate threedimensional subband coding. He states that adequate performance as well as good interoperability can be achieved with two-dimensional subband coding and hybrid transmission. Schreiber Further Reply Comments at 2-3.

[211] Sarnoff Reply Comments at 2-3.

[212] ATSC Comments at Annex 3, 7, 9; COMSAT Comments at 2-3.

[213] Schreiber Comments at 2-3. *See also Second Inquiry*, 3 FCC Rcd at 6536-37.

[214] Zenith Comments at 16.

[215] *See supra* this Section.

[216] *Cf.* Schreiber Reply Comments at 5 (encouraging familiarization with European DAB experiments that use Coded Orthogonal Frequency Division Multiplex channel coding and referring to the possible use of multiplex techniques being tested at MIT in connection therewith).

[217] *See infra* Section VII.E.

[218] NCTA Comments at 3; NCTA Reply Comments at 2 n.1.

[219] *Id.* at 3.

[220] EIA/ATV Reply Comments at 19.

[221] CableLabs is conducting tests of the cable-related performance of the proponent ATV systems, in conjunction with the broadcast-related performance tests being done by ATTC and ATEL. CableLabs will also be undertaking cable field tests at the same time as broadcast fields tests are conducted, and will be the primary organization responsible for analyzing the cable

gramming remains an outstanding issue.[222] PS/WP4 has been assigned to study compatibility questions relating to nonbroadcast media, including cable. As discussed *supra*, this group recently recommended use of headers and descriptors to convey both video and non-video information, an approach that would appear to facilitate transmission of encryption and decryption information. We ask the Advisory Committee to study and report back to us on the ability of the proponent systems to encrypt cable programming.

76. To address satellite compatibility with ATV, we must first recognize that satellites transmit in a different operating environment, one with bandwidth requirements and interference problems different from those experienced in terrestrial broadcasting. It is neither necessary nor practicable to restrict satellite ATV transmission to the standards set for terrestrial ATV.[223] Members of the Satellite Broadcasting and Communications Association (SBCA) are actively participating in PS/WP4. This SBCA representation has helped the Advisory Committee to devise a plan for establishing minimum performance criteria for satellite applications that coordinates with the overall timetable for recommendation of a system.[224] We encourage such efforts and believe that, contrary to some suggestions,[225] they obviate the need for further Commission action at this time. With respect to ATV compatibility with VCRs, we agree with ATSC that it is premature to propose specific VCR standards at this time.[226] We encourage the Advisory Committee, through PS/WP4, to address this question at the appropriate time.

C. Closed Captioning

77. We agree with NCI[227] that the Television Decoder Circuitry Act of 1990 (Decoder Act)[228] and Congressional intent underlying that statutee[229] require that closed captioning services continue to be available during the transition from NTSC to ATV and beyond. In April 1991, we adopted rules implementing the Decoder Act for NTSC receivers.[230] At that time, we promised to "continue to monitor the plans of high definition television transmission systems to ensure that closed-caption capability will continue to be available in the future."[231] We direct the Advisory Committee, in recommending an ATV standard, to take proper account of Decoder Act requirements, both as to closed captioning of simulcast or other HDTV program transmissions, and to the general closed captioning capability of ATV receivers.[232] Once an ATV system is selected, we plan to initiate a proceeding to adopt appropriate changes to our closed captioning rules.

D. Audio Advances: Extensibility and an ATV Standard

78. As stated above, extensibility, or in general, the ability of an ATV system to adapt to future improvements without creating obsolescence, is one of the ten selection criteria which the Advisory Committee is currently applying. The Advisory Committee is in the process of refining the concept of extensibility and relating it to each of the proponent systems. ATSC, through an *ex parte* filing, presents a concrete application of extensibility. ATSC states that recent advances in multi-channel audio coding technology have reduced the data rate required for five-channel audio nearly to that required for two independent audio channels. ATSC believes that an ATV system should be able to leave open the number and type of digital audio and data services included in an ATV channel, and allow data to be allocated to digital audio and data as needed. It believes that this would permit the addition of future new digital services, with older receivers ignoring new data types. It recommends that an ATV system be able to deliver five-channel audio.[233] ATSC states that all ATV

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test results. FCC Advisory Committee on Advanced Television Service Systems Subcommittee Fifth Interim Report at 13 (Systems Fifth Interim Report), *in* Fifth Interim Report, Appendix C.

[222] NCTA Comments at 3, 9-10; ATSC Comments at Annex 3-4.

[223] Satellite distribution need not use the same transmission format as terrestrial ATV in order for terrestrial broadcast stations to receive and retransmit such signals, provided that the same originating format is used. With respect to potential DBS-ATV transmission, we note that PS/WP4 is monitoring the efforts of EIA Committee R4.1 which is working to define an ATV receiver interface, including a satellite interface. We encourage the efforts of PS/WP4 in that regard.

[224] Charter of PS/WP4 Working Group on Satellite ATV Testing (formerly the SBCA Working Group on Satellite Testing of ATV) at 1; Fifth Interim Report at 5.

[225] Scientific-Atlanta Reply Comments at 1. *Cf.* COMSAT Comments at 3.

[226] T3/S2 Report, *supra*, at 7, 9.

[227] NCI Comments at 1-2. *See also* ATSC *Ex Parte* Filing at 1 (dated Feb. 5, 1992) (*ATSC Ex Parte)* (ATV system should allow service to visually and hearing impaired).

[228] 47 U.S.C. § 303(u), 330(b). The Decoder Act requires that television receivers with 13 inch or larger screens that are manufactured in or imported into the United States contain built-in decoder circuitry for closed captioning display. It also provides that "[a]s new video technology is developed, the Commission shall... ensure that closed-captioning service continues to be available to consumers."

[229] Both the Senate and House Reports cite high definition television as an example of a new technology to which closed captioning requirements would continue to apply, albeit by different means. S.Rep. No. 101-393, 101st Cong., 2d Sess. at 9-10 (1990); H.R. Rep. No. 101-767, 101st Cong., 2d Sess. at 14 (1990).

[230] *Amendment of Part 15 of the Commission's Rules to Implement the Provisions of the Television Decoder Circuitry Act of 1990*, 6 FCC Rcd 2419 (1991), *recon. denied*, 7 FCC Rcd 2279 (1992).

[231] *Closed Caption Order*, 6 FCC Rcd at 2433.

[232] 47 CFR 73.682(a)(22) provides that closed captioning of NTSC programs may be transmitted on line 21 of the vertical blanking interval of the television broadcast signal. However, HDTV systems are not expected to have such a vertical blanking interval. Rather, HDTV systems likely would use data blocks to convey ancillary data that could include closed captioning information. It appears that for simulcast programming, closed captioning information could be inserted into a data block of "upconverted" NTSC programming, and on line 21 of "downconverted" HDTV programming.

NCI suggests various enhancements to closed captioning capability, including flexible screen placement. Flexible screen placement is already a requirement in 47 CFR § 15.119(d)(1). Television receivers sold after July 1993 must meet this and other standards set forth in our rules. *See also Closed Caption Order*, 6 FCC Rcd at 2440. We expect any ATV system selected would, at a minimum, maintain such existing closed captioning standards.

[233] *ATSC Ex Parte* at 1. Five-channel audio provides for a right, center and left front channel plus a right and a left rear channel (or surround channel). If a composite signal is efficiently generated with these five audio channels, the data rate

receivers would need to decode the provided service (which could vary from one to five channels) into the number of loudspeaker channels to be used.[234]

79. While the focus until now has been on the video aspects of ATV, audio is another essential component of this new technology. ATSC appears to recommend a practical means of achieving extensibility in the audio component of an ATV system selected as a standard. We thus direct the Advisory Committee, consistent with our overall implementation plan, to address any new audio developments such as those discussed by ATSC, as well as ATSC proposals for flexible audio and data, in its selection of an ATV system. We also ask the Advisory Committee to consider any analogous instances of extensibility that arise.

E. New Developments

80. The *First Report and Order* stated that it was possible that a new fully digital system could be conceived that would require additional development time. We promised, with the assistance of the Advisory Committee, to review carefully, but quickly, any such new developments in 1992. We stated that if we found any new systems sufficiently developed to be tested, we would supplement the testing schedule accordingly.[235] Some commenters have suggested alternative systems or components thereof that they believe we should consider for adoption of a national standard.[236] The Advisory Committee has conducted a review of new developments. It has concluded that there are a number of techniques, still in the developmental stage, for the compression of video signals. However, it has found that none is sufficiently concrete to be contemporaneously tested with the systems now being judged. It thus finds that the five proponent ATV systems now under consideration represent the state of available technology.[237] We seek comment on these findings. We also request information on any other new developments (1) that "offer important new benefits" and (2) which are in a "sufficiently concrete state of development to be considered with existing systems".[238]

VIII. CONCLUSION

81. For the reasons given above, we find that the rules and policies we adopt herein will further the public interest by helping to bring the technological developments of advanced television service to the American public in an expeditious and non-disruptive fashion. We also seek comment on additional issues critical to our implementation plan.

IX. PROCEDURAL MATTERS

A. Notice and Comment Provisions

82. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before July 17, 1992, and reply comments on or before August 17, 1992. To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

B. *Ex Parte*

83. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.203, and 1.206(a).

C. Regulatory Flexibility Act Statement

84. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the expected impact on small entities of the proposals suggested in this document. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of this decision, but they must have a separate and distinct heading designating them as responses to the Initial Regulatory Flexibility Analysis. A Final Regulatory Flexibility Analysis Statement is contained in Appendix B. The Secretary shall send a copy of this *Second Report and Order/Further Notice of Proposed Rule Making,* including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

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needs to be only slightly greater than what would be required for two independent, high-quality audio signals, according to ATSC. Blonder, on the other hand, argues that surround sound is unnecessary. Blonder Comments at 1-2.

[234] *ATSC Ex Parte* at 1. Thus, a five-channel service could be decoded into mono for a low-cost mono receiver.

[235] *First Report and Order,* 5 FCC Rcd at 5629.

[236] Schreiber Further Reply at 3; (noting that Coded Orthogonal Frequency Division Multiplex (COFDM) (used in European DAB experiments) will be tested in the United Kingdom this Spring and that Columbia University is experimenting with joint source and channel coding and the use of multiresolution encoders); FIT Comments at 3 & n.5 (FIT system, using orthogonality in wave polarizations, can best be evaluated by over the air testing).

[237] Fifth Interim Report at 20 & Appendix F.

[238] *First Report and Order,* 5 FCC Rcd at 5629. We are prepared to recommend to the Advisory Committee supplemental testing for any system that meets these criteria. We agree, however, with EIA/ATV Committee, *see* EIA/ATV Committee Reply Comments at 16-17, that permitting consumers to comment on over-the-air picture quality of all proposed ATV systems before a final decision on a standard is made, as FIT suggests, *see* FIT Comments at 4 n.5, will unreasonably delay implementation of ATV.

ORDERING CLAUSE

85. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154 and 303, this *Second Report and Order/Further Notice of Proposed Rule Making* IS ADOPTED.

86. For further information regarding this proceeding, contact Gina Harrison, Legal Branch, Policy and Rules Division, Mass Media Bureau (202) 632-7792, Gordon Godfrey, Engineering Branch, Policy and Rules Division, Mass Media Bureau (202) 632-9660, or Alan Stillwell, Office of Engineering and Technology (202) 653-8162.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Statement

I. Reason for Action:

1. This action is taken to invite further comment on outstanding questions affecting implementation of advanced television (ATV) service in this country.

II. Objectives of the Action:

2. It is intended that the comments engendered through this action will resolve some of the issues surrounding the introduction of ATV service in this United States. Further comment is sought through this decision in order to establish a comprehensive, reliable record on which to base our decisions regarding ATV. The record established from comments filed in response to this decision, as well as other Commission decisions, and the combined efforts of the Commission, the affected industries, the Advisory Committee on Advanced Television Service, and the ATV testing process, will lead to implementation of ATV in the most harmonious fashion and to selection of the most desirable ATV system.

III. Legal Basis:

3. Authority for this action may be found in 47 U.S.C. §§ 154 and 303.

IV. Reporting, recordkeeping and other compliance requirements:

4. Such requirements are not proposed in this phase of the proceeding, but may be raised and comment sought, in future decisions in this proceeding.

V. Federal rules which overlap, duplicate or conflict with these rules:

5. There are no rules which would overlap, duplicate or conflict with these rules.

VI. Description, potential impact and number of small entities involved:

6. There are approximately 1,495 licensed commercial and educational UHF and VHF television stations, approximately 4,833 licensed UHF and VHF translator stations, and approximately 1,210 licensed UHF and VHF low-power television stations, who could be affected by the actions ultimately taken in this proceeding. Those who are initially eligible for ATV channels (full-service television broadcast station licensees, permittees authorized as of the date of adoption of the *Notice of Proposed Rule Making* (*Notice)* in this proceeding, and all parties with applications for a construction permit on file as of the date of adoption of the *Notice* ultimately awarded full-service television broadcast station licenses), who choose to apply for a channel, would be affected by the allotment and assignment procedures selected on the basis of the record resulting from this proceeding. In this decision, we propose that, later in the process, a table of allotments will be issued and public comment sought. Applicants will be allowed a period to negotiate channel assignments. If the parties cannot negotiate a pairing plan, assignments will be made on a first come, first served basis, with those applying at the same time would receive a channel based on random ranking of preferences.

7. If there is insufficient spectrum to accommodate all initially eligible parties, we would rank them as follows: (1) licensees and permittees with constructed facilities having program test authority, (2) all other permittees, and (3) applicants. In the case of insufficient spectrum to accommodate all licensees and constructed permittees in a community, we would apply some other method of deciding who would be assigned an ATV channel.

8. After initial assignments are made, ATV channels would then be assigned to: (1) parties ultimately awarded a permit based on an allotment petition pending as of the date of the *Notice*, regardless of whether or not the permittee had filed the original allotment petition, (2) parties awarded waivers of the current freeze on television broadcast applications in major markets and who are subsequently awarded an NTSC authorization, and (3) any other parties authorized to construct NTSC facilities in the interim period after adoption of the *Notice*. After this point, eligibility will be unrestricted.

9. We also propose to suspend the dual network prohibition rule, which prevents a network from simultaneously operating more than one network of television stations in identical or overlapping areas. Networks would thus be allowed to operate both an NTSC and an ATV network during the transition to ATV. In this regard, we also seek comment on whether the suspension should extend to circumstances where the two network feeds in a market go to *different* stations, and if so, on whether steps should be taken to ensure that a network cannot favor one station over the other, to the ultimate harm of one of the stations.

10. We seek comment on whether we should require LPTV and translator stations, at the time of "conversion" of full-service broadcast stations to ATV, to cease broadcasting in NTSC and broadcast only in ATV. By imposing a requirement only at the time of conversion to ATV, we will allow LPTVs ample opportunity to plan their transition to ATV.

11. We solicit comment on the results of an Advisory Committee review concluding that there are a number of techniques, still in the developmental stage, for the compression of video signals, but that none are apparent which are sufficiently concrete to be contemporaneously tested with the systems now being judged. It thus found that the

five proponent ATV systems now under consideration represent the state of available technology. We also request information on any other new developments (1) that "offer important new benefits" and (2) which are in a "sufficiently concrete state of development to be considered with existing systems. " Various small businesses could be affected by Commission action resulting from the response generated from the request for comment.

12. Station operators will be affected by our tentative decision to set the date for full conversion to ATV at 15 years from the date an ATV system is selected, or a final Table of ATV Allotments is effective, whichever is later. We believe that this date should permit the majority of consumers who purchase NTSC receivers prior to the introduction of ATV to get full use of their NTSC equipment, and also provide time for consumer acceptance of ATV to drive down the cost of ATV receivers from initial price levels, this spurring higher volume consumer ATV receiver sales. We are seeking comment, particularly from consumer electronics manufacturers and professional broadcast equipment suppliers on our proposed timetable. We are especially interested in detailed comments on the timing of widespread availability of ATV receivers and necessary ATV broadcast equipment, and on their projected prices. We also invite comment, particularly from system proponents and those parties with consumer manufacturing expertise, on the projected costs for ATV receivers during this 15-year period, and on the likely availability and cost of ATV downconverters. We seek comment on whether the possible availability of downconverters should influence the manner by which we assess ATV acceptance, and whether the availability of reasonably priced downconverters should lessen concerns about the premature obsolescence of NTSC sets in a household.

13. Broadcasters will further be affected by our tentative decision to require 100 percent simulcasting of the programming on the ATV channel no later than four years after the five-year ATV application/construction period has passed -- nine years after a standard becomes effective. We believe that this timeframe will afford broadcasters sufficient time to explore the potential of ATV and that by that point, ATV should have established itself, and ATV receiver penetration and revenues from ATV programming should be increasing. We do, however, seek comment on several approaches to simulcasting that would provide broadcasters with appropriate flexibility while requiring simulcasting. Broadcasters would, of course, be respectively affected, if after a review of the comments received in response to this *Order/FNPRM*, we choose a 100 percent simulcast requirement more or less stringent than the four year proposal. We also tentatively conclude that, from the outset, upconverted NTSC programming on broadcasters' second 6 MHz channel must be simulcast programming. Because we are awarding broadcasters a second 6 MHz channel on an interim basis to permit them to make a transition to ATV, we see no reason to permit use of that second channel for non-ATV programs that differ from those broadcast on the associated NTSC channel. Under this approach, non-simulcast programming on the ATV channel would have to be programming that takes full advantage of the technical capabilities of the ATV mode, for example: (1) programs produced in film and directly converted to the ATV mode, (2) programs originally produced on tape in the ATV mode, and (3) programs produced in the ATV mode live. We seek comment on this approach and on whether any other types of programs could take full advantage of ATV capabilities.

VII. Any significant alternatives minimizing the impact on small entities consistent with stated objectives:

14. In offering proposals for public comment in all facets of this proceeding, we have tried to select alternatives that would cause the least disruption to the least number of parties. This concern is reflected in the proposals adopted and discussed in the Final Regulatory Flexibility Act Statement in Appendix B. Several commenters suggest alternatives to our proposals or variations of our proposals which we reject for this reason. Public Television, for example, asks that we give any type of full-service broadcaster, including noncommercial broadcasters, permittees, or applicants priority over any other type in allotting a second 6 MHz channel. Several commenters ask that we grant priority status to low-power service stations. We also decline these suggestions.

15. Despite our tentative decision to set a 15-year date for full conversion to ATV, in recognition of the many factors which could develop making it difficult to accurately predict how ATV implementation will occur, we propose to review, in 1998, the propriety of the conversion date. This review should alleviate concerns about premature termination of NTSC, and should also leave room for adjustment if ATV implementation should proceed more or less swiftly than anticipated. By 1998, we should have gained considerable practical experience concerning the transition to ATV. We recognize that the development of downconverters for the reception of ATV programming on NTSC receivers may accelerate conversion, obviating the need for consumers to purchase new ATV receivers. Thus, the speed with which such converters may become available will also impact our determination of an appropriate conversion date. Also, by 1998, we should have better data regarding the development of set-top converters and other factors relevant to determination of a timetable for recapture of NTSC reversion spectrum. Therefore, our decision to review the 15-year conversion date in 1998 should ensure minimal financial harm to broadcast licensees.

16. In proposing a 100 percent simulcasting requirement no later than four years after the five-year ATV initial application/construction period, we seek to assuage any unduly burdensome effect on broadcasters by inviting comment on proposed approaches to simulcasting which would afford broadcasters flexibility in developing ATV technology. We realize that there may be a need for some initial flexibility in programming the ATV channel to permit the development of equipment and programming for this new technology and to attract consumer interest. Therefore, we suggest one alternative that would have us phase in our simulcasting requirement, permitting broadcasters to make adjustments in a gradual fashion. This staggered approach would allow broadcasters complete flexibility in programming the ATV channel during the first two years after the initial five-year application construction period has passed. However, as ATV implementation progresses, ATV receiver penetration should increase and the need for regulatory intervention to protect consumer investment and ensure our ability to reclaim the second 6 MHz channel will become more acute. Thus, starting two years after the initial application/construction deadline for existing broadcasters has passed -- seven years

from the time a Report and Order adopting an ATV standard becomes effective – we would require broadcasters to simulcast 50 percent of each day's programming. We believe that this 50 percent requirement would continue to afford broadcasters some flexibility as they implement full ATV production capabilities, but would also prompt them to prepare for complete conversion to ATV by ensuring that they do not use the second 6 MHz channel to develop a separate program service. The 50 percent simulcasting requirement would be increased to a 100 percent requirement within another two years at a point nine years after an ATV standard becomes effective.

17. Another approach to providing broadcasters with flexibility in developing ATV technology would involve a requirement that broadcasters air the same programming on the ATV channel, but permit flexibility with respect to time of airing or material included. We would broadly define "same time" at which simulcast programs are required to air, *e.g.*, as the same 24-hour period." Same program" could be defined as one which has as its basis the same underlying material. Thus, variances between programs accommodating the special nature of ATV or NTSC, such as different aspect ratios, angles, or number of cameras, or commentary would be permitted. We might also define "program" to exclude commercials and promotions and to include primary material such as movies, news, sports, and entertainment shows. We also seek comment on whether "program" should include material of some minimal duration. These proposed definitions for the timing and content of simulcast material would give broadcasters added flexibility and would alleviate concerns that a simulcasting requirement will have a chilling effect on program content or raise First Amendment concerns.

APPENDIX B

FINAL REGULATORY FLEXIBILITY STATEMENT

I. Need and purpose of this action:

1. The *Second Report and Order* portion of this decision resolves critical issues concerning implementation of Advanced Television (ATV) Service in this country. Our goal is to select the best ATV system and the most effective procedures for implementing that choice, with optimum results for the industries involved and the public, and with minimum negative consequences.

II. Summary of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis:

2. No comments were received in response to the Initial Regulatory Flexibility Analysis contained in the *Notice of Proposed Rule Making (Notice)*.

III. Significant alternatives considered and rejected:

3. First, we decide, as proposed in the *Notice*, to limit initial eligibility for ATV channels to existing broadcasters. We find that such a limitation is fully consistent with legal precedent such as *Ashbacker Radio Corp. V. FCC*. Most of the commenting parties agreed with the *Notice* that existing broadcasters' continued involvement in ATV is the most practical, expeditious, and non-disruptive way to bring improved service to the American public. Existing broadcasters possess the know-how and experience necessary to implement ATV swiftly and efficiently, have invested considerable resources in the present system and represent a large pool of experienced talent. As initial participants in the transition to ATV, existing broadcasters will be making an appreciable capital investment in this new technology and undertaking the concomitant business risks being in the forefront of such new developments entails. This initial restriction will be for a period of only two years, so that new entrants will not indefinitely be impeded. Further, after the initial ATV allotments and assignments are made, the table of ATV allotments may be expanded through the normal rulemaking process, and those additional channels would be open to all qualified parties. A broadcaster who fails to apply for and construct an ATV facility within the specified time would lose initial eligibility for the assigned channel which would then be open to competing applicants. Finally, we find this eligibility restriction in the long-run to be spectrally efficient.

4. One of the commenters suggests that if stations must ultimately surrender one of their two channels, rather than merely surrendering the NTSC channel, they should be permitted to sell it to recoup the cost of converting to ATV. We decide against this proposal as there are likely to be important competing uses for surrendered spectrum and because permitting such transfers to a third party would work against spectrum efficiency. Moreover, permitting such transfers makes it impossible to recapture one 6 MHz channel and still leave existing licensees with a broadcast outlet. Finally, we are awarding broadcasters a second channel to permit them to transition to an improved technology. If they choose not to broadcast in ATV, there is no reason to award them an additional license. Several commenters also ask that we accord priority status to low power service and noncommercial stations once initial ATV allotments are made and eligibility is unrestricted. We find no compelling reason to accord any priority during this period. Anyone may apply for the remaining channels on an equal basis.

5. We also elect not to adopt deadlines of three years to apply for, and two years to construct, a new ATV facility or to adopt a sliding scale whereby those applying early will have longer to construct. The record persuades us to allow two years to apply for, and three years to construct an ATV facility. We believe that by establishing such a concrete timetable, implementation of ATV will be accelerated and broadcasters will be encouraged to take the risk of moving into ATV early. We find that our current rules permitting extensions of construction permits should offer adequate relief for such possible delaying factors as litigation, local zoning problems, difficulty in locating a transmitter site, unavailability of equipment, and delays in obtaining government appropriations. We thus conclude that it is unnecessary to undertake additional regulatory initiatives to provide relief in unforeseen or extenuating circumstances.

6. We continue our tradition of considering, in spectrum planning, the important role noncommercial stations play and the financial constraints they face in building and running their stations. We should be able, for the most part, to accommodate existing stations with ATV channels without using vacant spectrum reserved for noncommercial use. We will dereserve vacant noncommercial allotments only when there is no feasible alternative, determined after a case-by-case study, for assigning an ATV channel to an existing broadcaster. We affirm that we will pair an additional ATV channel with

existing vacant noncommercial allotments and will leave a vacant allotment without an ATV pair only where careful engineering analysis reveals that an ATV channel is needed for delivery of ATV service by an existing eligible applicant. However, in light of our decision to require all licensees to convert to ATV when ATV becomes the prevalent medium, we do not believe it necessary, as suggested by one party, to use NTSC channels, relinquished in that conversion, as pairs for vacant noncommercial allotments.

7. Some parties ask that we deviate from our policy of continuing LPTV and translator stations' secondary status vis-a-vis full-service stations. We do not agree with the argument that it is impermissible and unfair because the low power service was not established as secondary to ATV stations, but only to certain land mobile service and full-power television broadcast service in existence at that time. The low-power service has had fair notice that it would have to yield to any full-service stations, without exception for the specific mode in which the full-service station transmits. We also will not deviate from established precedent and afford a preference to translators over low power stations or to foreign-language LPTVs. Because of the insufficient ATV spectrum available and because LPTV and translator stations are secondary to full-service stations, we reject the suggestion that LPTVs and translators be included in the class of broadcasters initially eligible for ATV frequencies, either on a primary or secondary basis, or that we factor in LPTV displacement considerations in making ATV assignments. As the multiple ownership rules do not apply to the low-power service, we will, however, permit low power service station operators to add a second ATV channel where there is sufficient spectrum. In addition, low-power television stations will be free to broadcast in either the ATV or NTSC mode. We also plan to initiate a rulemaking proceeding regarding engineering changes to help mitigate to effects of potential displacement.

8. We decline to terminate Gen. Docket No. 85-172, which proposed further sharing, or reallocation of, UHF channels in eight large urban areas to private land mobile service, because this action could be premature prior to adoption of a final Table of ATV Allotments. We also find that requests for reallocation of certain land mobile channels for television broadcast use are beyond the scope of this proceeding and are more appropriately the subject of a separate petition for rule making.

9. Several parties suggest that we defer a decision on whether broadcasters will be required to "convert" entirely to ATV --*i.e.*, surrender one 6 MHz reversion channel and broadcast only in ATV on the conversion channel, once ATV becomes the prevalent medium. We concur with the majority of commenters who support such a requirement for several reasons. First, requiring the surrender of the NTSC reversion channel will promote the introduction of ATV and maximize ATV coverage areas. Second, we believe that the benefits to be gained from affording the public a choice between ATV and NTSC programming are offset by the probability that permitting such a choice permanently would inhibit the growth of ATV. Most significantly, there are likely to be competing uses for this spectrum which will have to be addressed. Thus, we put broadcasters on notice that when ATV becomes the prevalent medium, they will be required to surrender their reversion channel and cease broadcasting in NTSC. We will cease issuing new NTSC licenses, including noncommercial NTSC licenses, and will issue new television broadcast licenses for ATV transmission only once we have completed the initial assignment of ATV channels to existing NTSC licensees, *i.e.*, two years after an ATV standard becomes effective.

10. We dismiss the argument that by ceasing to issue noncommercial NTSC license, we are defeating the purpose of pairing, where feasible, ATV channels with vacant noncommercial allotments. That pairing permits noncommercial applicants to continue applying for NTSC/ATV pairs until the point that initial ATV assignments are completed. Once that point is reached, noncommercial applicants will still be able to apply for the ATV channels that were set aside for the former NTSC noncommercial reserve. Additionally, if an existing broadcaster forfeits its initial eligibility for an ATV channel, that broadcaster will subsequently be allowed to apply, along with any other qualified parties, for any available ATV allotment or for an available ATV channel that will enable it to switch directly to an ATV channel at the time of conversion. If it is technically feasible, a broadcaster may also use its existing NTSC frequency for this purpose. Finally, modification to NTSC facilities will be permitted after adoption of a final Table of Allotments for ATV channels provided they comply with technical criteria for the protection of ATV vacant allotments, applications and assignments.

11. Contrary to the suggestions of some commenting parties who maintain that a decision on a date or triggering event for conversion to ATV should be deferred, we find that use of a firm date will keep administration simple, assure progress toward freeing spectrum on a timely basis and give broadcasters, consumers and manufacturers the benefits of a clearly defined planning horizon. A review of the record persuades us that complete reliance on ATV receiver penetration rates as a triggering event for conversion as suggested in the *Notice*, would not provide this same clear signal.

12. In the *Notice*, we sought comment on whether a simulcasting requirement would be a desirable means of protecting existing investment in consumer equipment during the transition to ATV. We conclude that a 100 percent simulcasting requirement is necessary at the earliest appropriate point. We find that a simulcast requirement will help ensure that consumers are not prematurely deprived of the benefits of their existing television receivers and other devices. In addition, we underscore that ATV is not a separate television serve and that we intend to reclaim the reversion channel as soon as possible. Requiring simulcasting will help us to do so by minimizing broadcaster and consumer reliance on the ATV channel as a separately programmed service. Further, a simulcast requirement will give added impetus to ATV receiver penetration by eliminating the need for dual-mode receivers capable of receiving both NTSC and ATV, thereby helping to lower the cost of ATV receivers, and so spurring increased penetration.

13. We address the need to ensure that reasonable patent licensing policies are adopted to generate the supply volumes necessary for ATV service to develop. Most parties believe that the winning proponent should employ such reasonable licensing policies. ATV testing procedures, however, already require proponents to submit, prior to testing, a statement that any relevant patents they own would be made available either free of charge or on reasonable nondiscriminatory terms. We believe that these requirements adequately safeguard the consumer and competitive interests in reasonable availability of relevant pat-

ents, so far as is possible at this point in time. However, at the point an ATV system is officially selected, we will condition that selection on the proponent's reasonable and nondiscriminatory licensing of relevant patents.

14. The *Notice* also raised the question of the successful system's compatibility with other transmission forms and media applications. The Advisory Committee and other bodies, including the Electronics Industry Association, Society of Motion Picture and Television Engineers, and the United States Advanced Television Systems Committee, are presently addressing these issues. The Advisory Committee's Planning Subcommittee Working Party 4 plans to initiate a case-by-case analysis of each proponent system's suitability "for cost-effective, optimum quality interoperation with alternative delivery media and applications..." That group has also recommended the adoption of headers and descriptors which might be useful in achieving compatibility with other applications and other media by permitting different amounts and kinds of data to be used by different applications and media. It is monitoring studies performed by other organizations relevant to this concept, and is planning to conduct its own further studies in this area. Moreover, the Advisory Committee selection process already takes compatibility concerns into account, and interoperability and extensibility are among the ten selection criteria the Advisory Committee will employ. We encourage this work of the Advisory Committee and of the industry, and do not believe it necessary or productive at this stage in the progress of such activities for us to intervene.

APPENDIX C

Commenting Parties in MM Docket No. 87-268 (filed Dec. 20, 1991 unless otherwise indicated)

American Telephone and Telegraph Co. (AT&T)

Association of America's Public Television Stations, Corporation for Public Broadcasting, and Public Broadcasting Service (collectively Public Television)

Balcones Broadcasting Limited (Balcones)

Blonder Broadcasting Corp. (Blonder) (Dec. 4, 1991)

Bradenton Broadcast Television Company, Ltd. (Bradenton)

Daniel Brady, Manager, Visualization Group and Matthew Arrott, Senior Graphics Programmer, Visualization Group, National Center for Supercomputer Applications (Brady)

Brooks Broadcasting (Brooks)

Brunson Communications, Inc. (Brunson)

Capital Cities/ABC, Inc. (CapCities)

Channel 13 Television, Inc. (Channel 13) (Dec. 17, 1991)

Children's Television Workshop (CTW)

Cohen, Dippell and Everist, P.C., Consulting Engineers (CDE)

Communicasting Corporation (Communicasting)

Community Broadcasters Association (CBA)(Dec. 19, 1991)

COMSAT Video Enterprises, Inc. (COMSAT) (Dec. 19, 1991)

Consumer Electronics Group of the Electronic Industries Association (EIA/CEG)

Gary Demos (DemoGraFX) corrected 12/23/91

Hugh Carter Donahue, Ph.D. (Donahue) (Dec. 18, 1991)

du Treil, Lundin & Rackley, Inc. (dLR)

Francis Dummer Fisher, Visiting Scholar, LBJ School of Public Affairs, University of Texas at Austin (Fisher) (Dec. 16, 1991)

Fox, Inc. (Fox)

Future Images Today (FIT)

General Instrument Corp. (GIC)

Branko J. Gerovac, Corporate Research and Architecture, Digital Equipment Corporation (Gerovac)

Golden Orange Broadcasting Co., Inc. (Golden Orange)

Great American Television and Radio Company, Inc. (Great American) (styled as "Supplemental Comments")

Institute for Alternative Futures (IAF)

Island Broadcasting Co. (Island)

Joint Broadcaster Comments of: National Association of Broadcasters; Association for Maximum Service Television, Inc.; Association of Independent Television Stations, Inc.; Public Broadcasting Service; Capital Cities/ABC, Inc.; National Broadcasting Company, Inc.; Association of America's Public Television Stations; CBS, Inc.; Fox, Inc. & Fox Television Stations, Inc.; Network Affiliated Stations Alliance - ABC Television Network Affiliates Association, CBS Television Network Affiliates Association, NBC Television Network Affiliates Association; A.H. Belo Corporation; Allbritton Communications Group; American Family Broadcast Group, Inc.; Arkansas Television Company; Bahakel Communications, Ltd., Benedek Broadcasting Corporation; Blade Communications, Inc.; Bonneville International Corporation; Burnham Broadcasting Company, A Limited Partnership; Busse Broadcasting Corporation; Capitol Broadcasting Company, Inc.; Cedar Rapids Television Company; Chronicale Publishing Company; Cosmos Broadcasting Corporation; Cox Communications, Inc.; Diversified Communications; Eagle Communications, Inc.; Encore Communications, Inc. of Syracuse; Eagles Communications, Inc.; Fisher Broadcasting, Inc.; Forum Publishing Company; Gannett Company, Inc.; Gateway Communications, Inc.; Gillett Holdings, Inc.; Gray Communications Systems, Inc.; Great American Television and Radio Company, Inc.; Griffin Television, Inc.; Heritage Media Corporation; HSN Communications, Inc.; Hubbard Broadcasting, Inc.; Independent Broadcasting Company, Jefferson-Pilot Communications Company & Jefferson-Pilot Communications Company of Virginia; Kelly Broadcasting Company; Kelly Television Company; King Broadcasting Company; Koplar Communications, Inc.; Lin Broadcasting Corporation; Love Broadcasting Company; Maine Broadcast-

ing System; Media General Broadcast Group; Meredith Corporation; McGraw-Hill Broadcasting Company, Inc.; Michiana Telecasting Corp.; Midwest Television, Inc.; ML Media Partners, L.P.; Multimedia Broadcasting Co.; Nationalwide Communications, Inc., Nepsk, Inc.; The New York Times Company (and its broadcast subsidiaries); Qutlet Broadcasting, Inc.; Plains Television Partnership; Pollock/Belz Communications Co., Inc.; Ponce-Nicasio Broadcasting, Ltd.; Post-Newsweek Stations, Inc.; Precht Television Associates, Inc.; The Providence Journal Company; Quincy Newspaper Broadcast Group; Renaissance Communications Corp.; Retlaw Enterprises, Inc.; Rose Communications; Sarkes Tarzian, Inc.; SCI Television, Inc.; Scripps Howard Broadcasting Company; Spartan Radiocasting Co.; Sunbeam Television Corporation; Sunshine Television, Inc.; Taft Broadcasting Partners Limited Partnership; Tribune Broadcasting Company; United Communications Corp.; Vermont ETV, Inc.; W. Russell Withers, Jr., Licensee of KREX-TV, KREZ-TV, KREG-TV, KREY-TV, WDTV and KAVU-TV; WBNS-TV; Westinghouse Broadcasting Company, Inc.; WFRV-TV, Inc.; WGBH Educational Foundation; WKBN Broadcasting Corporation; WPEC/Photo Electronics Corporation; WPHL-TV, Inc.; WPSD-TV; WTHR-TV; WTHR-TV; WTVZ, Inc.; WWOR-TV, Inc.; Young Broadcasting, Inc. (Joint Broadcasters Comments)

Vinod Khosla, General Partner, Kleiner Perkins Caufield & Byers (Khosla) corrected 12/23/91

Liberty Television, Inc. (Liberty)

Michael N. Liebhold, Manager, Media Architecture Research, Apple Computer Inc. (Liebhold),

Andrew Lippman, Associate Director, MIT Media Laboratory, Massachusetts Institute of Technology (Lippman)

Alan K. McAdams, Professor of Managerial Economics, Johnson Graduate School of Management, Cornell University (McAdams)

Motorola, Inc. (Motorola)

National Cable Television Association, Inc. (NCTA)

National Captioning Institute, Inc. (NCI)

North American Philips Corporation (Philips)

Prof. Kenneth L. Phillips (Phillips) corrected 12/26/91

Polar Broadcasting, Inc. (Polar)(Dec. 19, 1991)

William F. Schreiber, Professor of Electrical Engineering, Emeritus, Research Laboratory of Electronics, Massachusetts Institute of Technology (Schreiber) (Dec. 18, 1991)

Richard Jay Solomon, Professor of Electrical Engineering, Research Laboratory of Electronics, Massachusetts Institute of Technology (Solomon)

Spacelabs, Inc.

David H. Staelin (Staelin) (Dec. 18, 1991)

Telemundo Group, Inc. (Telemundo) corrected Declaration 12/23/91

Third Coast Broadcasting, Inc. (Third Coast) amended 12/23/91

United States Advanced Television Systems Committee (ATSC) (Dec. 19, 1991)

S. Merrill Weiss, Consultant (Weiss)

Westinghouse Broadcasting Company, Inc. (Westinghouse)

Zenith Electronics Corporation (Zenith)

Parties Filing Informal Comments

Kyriacos Antoniades (filed Dec. 13, 1991)

KHR-TV 14 (filed Dec. 23, 1991)

David Rank (filed Dec. 6, 1991)

B.W. St. Clair (St. Clair)(filed Dec. 26, 1991)

Society of Motion Picture and Television Engineers (SMPTE)(filed Dec. 31, 1991)

E. Hyatt Taylor (filed Dec. 2, 1991)

David L. Tennehouse, Telemedia, Networks & Systems Group, Laboratory for Computer Science, Massachusetts Institute of Technology (Tennenhouse)(faxed Dec. 10, 1991)

Parties Filing Reply Comments
(filed Jan. 31, 1992, unless otherwise indicated)

Association for Maximum Service Television, Inc. (MST)

AT&T

CBA (Jan. 21, 1992)

David Sarnoff Research Center, Inc. (Sarnoff)(Jan. 29, 1992)

EIA/ATV Committee

Golden Orange

Island (Jan. 17, 1992)

Land Mobile Communications Council (LMCC)

NCTA (Jan. 21, 1992)

Paramount Stations Group Inc. (Paramount) (filed Jan. 21, 1992)

Polar Broadcasting, Inc.; Polar Broadcasting of Arizona, Inc.; Linda K. Trumbly; Peninsula Communications, Inc.; Kaleb C. Trumbly; Warren L. Trumbly; Ted C. Tucker; Gary M. Kenny; Gary M. Kenny & Deborah R. Kenny; Peggy L. Davis & Deborah R. Kenny (Collecting Polar) (Jan. 21, 1992)

Public Television (Jan. 21, 1992)

St. Clair (filed Jan. 28, 1992)

Scientific-Atlanta (Jan. 21, 1992)

Staff of the Bureau of Economics of the Federal Trade Commission (FTC) (styled "Comment")

Telemundo (Jan. 21, 1992) (signature page filed Jan. 22, 1992) Tribune Zenith

Parties Filing Informal Replies

Fleet Call, Inc. (Fleet Call)

Schreiber (filed Feb. 3, 1992)

Schreiber (Schreiber Further Reply) (filed February 11, 1992)

Richard Solomon and Lee McKnight (Solomon/McKnight)(filed Feb. 3, 1992)

APPENDIX D

Analyses of UHF TV Receiver Interference Immunities Concerning Advanced Television, OET Technical Memorandum, FCC/OET TM88-2 (August 1988)

Charter of PS/WP4 Working Group on Satellite ATV Testing (formerly the SBCA Working Group on Satellite Testing of ATV)

EIA Color Television Replacement Cycle Study (April 1985)

Fifth Interim Report of the FCC Advisory Committee on Advanced Television Service (March 24, 1992) *This document contains the following:

Advisory Committee on Advanced Television Planning Subcommittee Working Party 4 Interim Report (Appendix G) (December 31, 1991), which in turn contains:

Fifth Interim Report of the Spectrum Utilization and Alternatives Working Party 3 of the Planning Subcommittee of the Advisory Committee on Advanced Television Service

Fifth Interim Report of the Working Party 5 on Economic Factors and Market Penetration of the Planning Subcommittee of the FCC Advisory Committee on Advanced Television Service

FCC Advisory Committee on Advanced Television Service Systems Subcommittee Fifth Interim Report (Appendix H)

Implementation Subcommittee Fifth Interim Report to the FCC Advisory Committee on Advanced Television Service (Appendix I) (February 1992), which in turn contains:

Report of Working Party 1 of the Implementation Subcommittee Contribution to the Fifth Interim Report of the Implementation Subcommittee from Working Party 2 on Transition Scenarios

Fourth Interim Report of the Working Party 5 on Economic Factors and Market Penetration of the Planning Subcommittee of the Advisory Committee on Advanced Television Service (March 4, 1991)

Further Studies on the Availability of Spectrum for Advanced Television, OET Technical Memorandum, FCC/OET TM89-1 (December 1989)

High Definition Television: Transition Scenario for TV Stations: A CBS Work-in-Progress (October 23, 1990 Preliminary Results)

Interim Report: Estimate of Availability of spectrum for Advanced Television (ATV) in the Existing Terrestrial Broadcast Bands, OET Technical Memorandum, FCC/OET TM88-1 (August 1988)

Letter to Thomas J. Sugrue, Esq., Acting Assistant Secretary for Communications and Information, United States Department of Commerce from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (February 11, 1992)

Letter to Nancy H. Mason, Deputy Undersecretary, Technology Administration, United States Department of Commerce, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (February 11, 1992)

Letter to Constance L. Robinson, Esq., Chief, Communications and Finance Section, Antitrust Division, United States Department of Justice, from Kenneth Robinson, Senior Legal Adviser to the Chairman, Federal Communications Commission (February 11, 1992)

Memorandum of Understanding among Federal Communications Commission, Advisory Committee on Advanced Television, Advanced Television Test Center, and CableLabs (dated November 14, 1990)

Minutes of the Twelfth Meeting of Systems Subcommittee Working Party 4 (August 29, 1991)

Preliminary Analysis of VHF and UHF Spectrum Scenarios in Part III, Advisory Committee, Planning Subcommittee Working Party 3, Doc. 0174 (June 1991)

Report of the SMPTE Taks Force on Headers/Descriptors (January 3, 1992)

"SMPTE Approves Task Force Report on Headers/Descriptors," Society of Motion Picture and Television Engineers, Press Release (dated February 7, 1992)

APPENDIX E
Glossary of Terms, Abbreviations and Acronyms

ACTV -- Advanced Compatible Television. The only Enhanced Definition Television system on the test schedule, proposed by the Advanced Television Research Consortium.

Advanced Digital High Definition Television -- One of the digital HDTV systems on the test schedule, proposed by the Advanced Television Research Consortium.

Advanced Television (ATV) -- Any television technology, including High Definition Television and Enhanced Definition Television, that provides improved audio and video quality or enhances the current television broadcast system.

Advanced Television Evaluation Laboratory (ATEL) -- Organization located in Ottawa, Canada, undertaking the subjective video testing of the proposed ATV systems.

Advanced Television Test Center (Test Center) -- Organization formed by the Advisory Committee on Advanced Television to conduct broadcast testing of the qualified proposed ATV systems.

Advisory Committee on Advanced Television Service (Advisory Committee) -- Panel formed by the Federal Communications Commission in 1987 to advise

the Agency on the technical and public policy issues concerning Advanced Television. Membership is comprised of industry leaders from diverse sectors, including the broadcast, cable, computer, and manufacturing industries.

Allocation, Allotment, Assignment -- As a technical matter, spectrum space is "allocated" to a particular service. The allocated channels are then "allotted" to specific geographic areas, and the allotted channels are then "assigned" to a licensee.

ANSI -- The American National Standards Institute, which establishes patent policy adhered to in the ATV Test Procedures Test Management Plan.

Aspect Ratio -- The ratio of picture width to picture height. ATRC -- The American Television Research Consortium, proponent of the Advanced Compatible Television system and the Advanced Digital High Definition Television system. Membership consists of the David Sarnoff Research Center, North American Philips, Thomson Consumer Electronics, NBC, and Compression Labs.

ATVA -- The American Television Alliance, proponent of the DigiCipher system and the ATA Progressive System. Membership consists of General Instrument Corporation and the Massachusetts Institute of Technology.

ATVA Progressive System -- One of the digital HDTV systems on the test schedule, proposed by the American Television Alliance.

Broadcast Auxiliary Spectrum -- Microwave frequencies allocated for use by television stations to convey their signals on a point-to-point basis from fixed or mobile facilities.

Cable Television Laboratories, Inc. (CableLabs) -- Organization sponsored by the cable industry, which is conducting tests of the cable-related performance of the proposed ATV systems.

Closed Captioning -- Technology which allows captions to appear on a specially equipped receiver screen at the same time the words are being broadcast, generally used so that dialogue can be followed by deaf viewers.

COHRS -- The Committee for Open High Resolution Systems Conversion -- The point at which broadcast licensees would cease broadcasting in NTSC and "convert" entirely to ATV programming, *i.e.*, surrender one 6 MHz channel and broadcast only in ATV.

Conversion Channel -- One of the two 6 MHz channels which will be assigned to broadcasters to enable them to transmit in both ATV and NTSC for the interim period prior to conversion to ATV alone.

DBS -- Direct Broadcast Satellites

Decoder Act -- The Television Decoder Circuitry Act of 1990, which requires television receivers with screens 13 inches or larger that are manufactured in or imported into the United States, contain built-in decoder circuitry for closed captioning display, and that the Commission ensure continued closed captioning service.

Descriptor -- A descriptor identifies the technical characteristics of the data in a digital signal.

DigiCipher -- One of the digital HDTV systems on the test schedule, proposed by the American Television Alliance.

Digital Spectrum Compatible HDTV (DSC-HDTV) -- One of the digital HDTV systems on the test schedule, proposed by Zenith and American Telephone and Telegraph.

Downconversion -- Changing a program from the HDTV format to the NTSC format.

Dual Network Rule -- Commission rule (47 CFR § 73.658(g) which prohibits a network from simultaneously operating more than one network of television tations in identical or overlapping geographic areas.

Enhanced Definition Television (EDTV) -- Television systems that provide limited improvements over the current NTSC broadcasting system.

Extensibility -- As defined by the Advisory Committee, a property of a system, format, or standards that allows future improvements in performance or format within a common framework, while retaining partial or complete compatibility among systems that belong to the common framework.

Five Channel Audio -- A system characteristic which provides for a right, center, and left front channel, plus a right and a left rear channel (or surround channel).

Harmonization -- As defined by the Advisory Committee, the coordination of different advanced image standards in an orderly process.

Header -- A sort of digital label which identifies the type of data and type of processing performed on the data that follows.

High Definition Television (HDTV) -- Television systems which aim to offer approximately twice the vertical and horizontal resolution of the existing NTSC receivers and to provide picture quality approaching that of 35 mm film and audio quality equal to that of compact discs.

Interoperability -- As defined by the Advisory Committee, the capability of providing useful and cost-effective interchange of electronic image, audio and associated data: among different signal formats, among different transmission media, among different performance levels.

UIS/WP1 -- Working Party 1, Policy and Regulation, of the Advisory Committee's Implementation Subcommittee.

IS/WP2 -- Working Party 2, Transition Scenarios, of the Advisory Committee's Implementation Subcommittee.

Low Power Television (LPTV) -- A broadcast television facility with secondary service status that is authorized to retransmit the programs and signals of a TV broadcast station and that may originate programming and/or operate a subscription service.

Narrow MUSE -- The analog HDTV system on the test schedule, proposed by NHK.

NHK -- The Japan Broadcasting Company, proponent of the Narrow MUSE HDTV system.

NTSC -- The existing broadcasting system, named after the National Television Systems Committee.

PS/WP3 -- Working Party 3, Spectrum Utilization and Alternatives, of the Advisory Committee's Planning Subcommittee.

PS/WP4 -- Working Party 4, Alternative Media Technology and Broadcast Interface, of the Advisory Committee's Planning Subcommittee.

PS/WP5 -- Working Party 5, Economic Factors and Market Penetration, of the Advisory Committee's Planning Subcommittee.

Reversion Channel -- One of the two 6 MHz channels assigned to broadcasters during the transition to ATV. This channel will be reclaimed by the Commission after full conversion to ATV.

SBCA -- Satellite Broadcasting and Communications Association.

Scalability -- As defined by the Advisory Committee, the degree to which video and image formats can be combined in systematic proportions for distribution over communications channels for varying capacities.

Studio-Transmitter Link (STL) -- A type of broadcast auxiliary channel used for transmissions between a television station's studio and the station's transmitter.

Terrestrial Broadcast Station -- Broadcast stations which transmit from a tower located on the surface of the earth as opposed to a satellite system with a space station.

Translator -- A low-power TV station which does not originate programming and acts only to retransmit the signals of a full-service tv station.

Upconversion -- Changing a program from NTSC to HDTV format.

Vertical Blanking Interval -- That portion of the TV signal that appears as a black bar when the picture rolls. The Commission's Rules currently provide that closed captioning of NTSC programs for the deaf may be transmitted on line 21 of the vertical blanking interval.

STATEMENT OF COMMISSIONER ERVIN S. DUGGAN

In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service (MM Docket No. 87-268)

Seventeen days ago my colleagues and I travelled to the Capitol to see the first live, over-the-air and cable-delivered glimpse of HDTV. Today we take another significant step toward the actual inauguration of HDTV in the United States beginning in this decade. With these events, we establish Spring 1992 as the time when high-definition television moved out of the realm of theory and into the here and now.

Today we begin to outline a vision for the transition to HDTV broadcasting. In June, we will propose a Table of Channel Allotments for HDTV spectrum. Next year, we will select the standard for this new television system. These decisions are not just significant: they are fateful. We are, in essence, decreeing the creation of a whole new broadcast television industry and the shutting down of the old one. We do not do so lightly. I believe all of us realize that the move from conventional to advanced television will be expensive, difficult and time-consuming; that full conversion to advanced television broadcasting is likely to take more than a decade.

With all those complexities and difficulties fully in mind, we nevertheless express great confidence today: confidence that a firm set of rules and principles can be devised to keep the process orderly. Confidence that we can establish a rational process with a beginning, a middle and an end.

The first principle we establish today is that the spectrum we grant for HDTV is for a conversion process; it is not a giveaway. When that process is complete, television licensees will keep a "conversion channel" of 6 MHz and--- let us make no mistake about it--- they will surrender a "reversion channel" to the public domain. The very labels we attach to the process--- "conversion" channel and "reversion" channel--- will serve as a constant reminder that the FCC's grant of spectrum for HDTV is not only additional: it is conditional and transitional. The spectrum we will eventually assign for advanced television development, in short, has a strong tether attached to it; squatter's rights on the second channel are not what this Commission has in mind.

A second principle is that this conversion process hinges upon a firm cutover date for the end of old-style broadcast TV and the advent of full advanced television. We must adopt a simulcasting approach that moves licensees as quickly as possible to full high-definition transmission. In the item we vote today, we express clear ideas about that cutover date and the simulcasting policy we prefer. Our intention is to make final decisions on these issues as soon as possible.

We have not come to this moment by magic, or by accident. Fortunately, we have been able to rely upon the talents of some of the best and brightest persons from the television industry on the Advisory Committee on Advanced Television Service. We owe a debt of gratitude to every one of those persons for the work they have done and will continue to do. We owe a special debt to a remarkable figure in the world of Communications: Chairman Richard E. Wiley. We owe a great deal, finally, to the leadership of FCC Chairman Al Sikes. His tireless efforts to move advanced television from the drawing board to the laboratory and, eventually, into American homes and the global marketplace deserves to be remembered and honored years from now.

Let me sound, finally, a note of warning, and a summons. Until today, the development of policies for advanced television in the United States has been largely in the hands of elites: the Advisory Committee; trade associations; large broadcast corporations; eminent engineers and lawyers. They have brought HDTV from the wild blue yonder closer to solid earth. Now it is time to move the debate from inside the Beltway to the grass roots. Now it is time for the dialogue to expand: to embrace the greatest possible number of individual television broadcasters. The burden of introducing HDTV, after all, will largely be theirs to bear--- and the public interest in an orderly transition to advanced television is theirs to protect. If there are television broadcasters at the grass roots who have not yet focused fully on the implications for

them of HDTV--- the costs and the difficulties, and also the opportunities--- now is the time for them to get involved.

*U.S. Government Printing Office: 1992 — 312-024/60019